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No. __-___

IN THE

Supreme Court of the United States

METRO-NORTH COMMUTER RAILROAD COMPANY,

Petitioner,

—v.—

CHARLES ROBINSON, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In adjudicating a motion for class certification of company-wide claims of employment discrimination, must the district court disregard an expert opinion offered by the company to demonstrate that the plaintiffs' statistical evidence of race-based disparities does not satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure (FRCP)?

2. Can the standards for class certification set forth in FRCP 23(b)(2) be satisfied in an employment discrimination suit that seeks recovery of individualized relief, including compensatory damages, for allegedly discriminatory decisions attributable to hundreds of individual supervisors?

3. In a suit alleging a company-wide pattern and practice of employment discrimination, are plaintiffs automatically entitled to class certification of their claims for class-wide liability and injunctive relief, pursuant to FRCP 23(b)(2), without regard to whether their individual claims for relief are suitable for class certification?

LIST OF PARTIES

The defendant-petitioner is Metro-North Commuter Railroad Company ("Petitioner" or "Metro-North").

The following plaintiffs-respondents appealed to the Second Circuit the district court's decision denying their consolidated motion for class certification and bifurcation in *Robinson v. Metro-North*: Charles Robinson, Sharon E. Mack, James Oliver, Darryl F. Simpson, Veronica Caridad, Donald Hines, James Jackson, Lord Taylor, Earl Vaughan, Daniel Canada, Marvin Edwards, Eric Jones, and Raymond Norris.

CORPORATE DISCLOSURE STATEMENT

Metro-North Commuter Railroad Company is a public benefit corporation and a wholly-owned subsidiary of the Metropolitan Transportation Authority. *See* N.Y. Pub. Auth. Law §§ 1260, *et seq.* (McKinney's 1999 & Supp. 2001).

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Metro-North Commuter Railroad Company ("Petitioner" or "Metro-North"), respectfully petitions this Court to issue a writ of certiorari to review the October 9, 2001 and July 29, 1999 decisions of the United States Court of Appeals for the Second Circuit. The Second Circuit's decision and order of October 9, 2001 vacated and remanded a decision of the United States District Court for the Southern District of New York insofar as it had denied plaintiffs' motions for class certification under Rule 23(b)(2) of the Federal Rules of Civil Procedure (FRCP) and bifurcation of the liability and damages portions of the case. The Second Circuit's earlier decision and order of July 29, 1999 reversed and remanded a decision by the district court denying plaintiffs' motion for class certification for failure to satisfy the standards of FRCP 23(a).

OPINIONS BELOW

The Second Circuit's decision of October 9, 2001 appears at pages A-1-38 of the Appendix to this Petition and is reported as *Robinson v. Metro-North Commuter Railroad Co.*, 267 F.3d 147 (2d Cir. 2001). The Second Circuit's decision of July 29, 1999, appears at pages A-39-66, and is reported as *Caridad v. Metro-North Commuter Railroad*, 191 F.3d 283 (2d Cir. 1999). The decision denying Metro-North's Petition for Panel Rehearing and Petition for Rehearing *En Banc*, dated October 6, 1999, and captioned *Norris v. Metro-North*, appears at pages A-85-86 and is unpublished. The district court's decision denying plaintiffs' motions for class certification and bifurcation, dated September 27, 2000, appears at pages A-67-76, and is reported as *Robinson v. Metro-North Commuter Railroad Co.*, 197 F.R.D. 85 (S.D.N.Y. 2000). The district court's decision denying plaintiffs' motion for class certification under Rule 23(a), dated

August 8, 1997, appears at pages A-77-84, and is reported as *Robinson v. Metro-North Commuter Railroad Co.*, 175 F.R.D. 46 (S.D.N.Y. 1997).

JURISDICTION

The United States Court of Appeals for the Second Circuit issued its most recent decision on class certification on October 9, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL RULES INVOLVED

The provisions of FRCP 23 are at issue in this Petition. The text of this rule appears at pages A-87-90 of the Appendix.

STATEMENT OF THE CASE

Plaintiffs asserted company-wide claims of racial discrimination in discipline and promotion on behalf of over 1,200 African-American employees at Metro-North. Their Complaint demanded both class-wide injunctive relief and individual monetary relief. The challenged decisions were made by hundreds of individual supervisors acting pursuant to company policies and procedures that plaintiffs conceded were nondiscriminatory. The Second Circuit nevertheless ruled that plaintiffs satisfied the requirements of commonality and typicality under FRCP 23(a). The court subsequently ruled that all, or at least the class-wide liability portion, of their claims should be certified under FRCP 23(b)(2), even though FRCP 23(b)(2) is available only for claims seeking predominantly injunctive or declaratory relief.

1. *Metro-North's Operations*

Metro-North is a public benefit corporation responsible for providing commuter rail transportation between New York City and its northern suburbs, including Connecticut. It employs approximately 5,700 employees in 220 different occupations, spread over 37 departments at numerous locations in New York City and its suburbs to the north. Some 4,700 of these employees ("union employees") are represented by one of Metro-North's 16 unions.

2. *Metro-North's Decentralized Procedures For Disciplining Union Employees*

Pursuant to procedures set forth in the applicable collective bargaining agreements and the Railway Labor Act, 45 U.S.C. § 153(Second), a supervisor or manager may bring "charges" against a union employee for violations of Metro-North's policies, procedures and safety rules. There are over 400 supervisors and managers with authority to bring such charges. Following an investigation conducted by a hearing officer, the charging supervisor determines what, if any, discipline to impose. The employee may then appeal the imposition of discipline, first to the Labor Relations Department, and ultimately to a 3-person binding arbitration panel, with a neutral arbitrator holding the deciding vote.

3. *Metro-North's Decentralized Promotion Process*

Decisions concerning the movement of employees into management-level positions, either from other positions at Metro-North or from outside the company, are made by 125 managerial and supervisory employees located throughout the company who are known as "hiring representatives."

Promotion decisions are governed by company-wide policies and procedures designed to prevent arbitrary conduct and ensure that the most qualified candidates are considered. Representatives of Metro-North's Personnel Department review closely with the hiring representatives the basis for each hiring or promotion decision and report to their superiors any issues concerning the appropriateness of a selection.

4. *Plaintiffs' Complaint*

In October 1994, seven plaintiffs commenced *Robinson v. Metro-North Commuter Railroad*, 94 Civ. 7374, alleging claims under, *inter alia*, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000(e), *et seq.* Pursuant to subsequent amendments, the Complaint eventually included 16 other individuals. In October 1995, a second Title VII lawsuit, *Norris v. Metro-North Commuter Railroad*, 95 Civ. 8594, was brought on behalf of five (later seven) other plaintiffs.

The Complaints alleged a company-wide pattern and practice of racial discrimination in discipline and promotion and a disparate impact claim, on the basis of which plaintiffs demanded injunctive and equitable relief and compensatory damages. The compensatory relief demanded included: "monetary damages for loss of income, including bonuses and merit raises, managerial pension plan contributions, due to wrongful suspension, wrongful termination, failure to promote; and for serious and permanent emotional distress due to degradation, denigration, harassment, and humiliation." Although the Complaints also demanded punitive damages, plaintiffs later conceded that such relief is not available because Metro-North is a governmental agency.

5. Plaintiffs' First Motion for Class Certification

Following discovery limited to class certification issues, plaintiffs in the two lawsuits filed a consolidated motion seeking certification of a class consisting of all present and former African-American employees. Plaintiffs conceded that the central organs of the company responsible for those decisions – including the Personnel and Labor Relations Department – had not engaged in any discriminatory conduct. Nevertheless, based largely on an expert statistical report containing "regression" analyses of company-wide data on the frequency with which African-American and White employees are disciplined and promoted, plaintiffs contended that they had satisfied Rule 23(a)'s commonality and typicality requirements with respect to both their pattern and practice disparate treatment claim and their disparate impact claim.[1]

In response to plaintiffs' motion, Metro-North submitted the statistical report of its own expert, who opined that the statistical disparities identified in plaintiffs' expert report were not manifested throughout the company and, thus, did not support a finding of commonality and typicality. The expert demonstrated that plaintiffs' expert report suffered from the "fallacy of composition," pursuant to which data which did not reveal any race-based disparities when examined on a departmental or occupational basis became camouflaged when merged together with data on other departments or

[1] FRCP 23(a) requires, *inter alia*, that plaintiffs demonstrate that "there are questions of law or fact common to the class" and "the claims or defenses of the representative parties are typical of the claims or defenses of the class." (A-87)

occupations. (A-46)[2] Among other things, Metro-North's expert observed that:

- There were huge differences in the number of disciplines and promotions among the departments;
- There were no recorded disciplines at all in 25 of Metro-North's 37 departments;
- When broken down by positions, the data did not reveal any disparities in the discipline rates for African-Americans and Whites in departments employing at least 52% of the employees of the company; and
- When limited to positions from which employees had been promoted, the data revealed no disparities between the promotion rates for African-American and White employees.

In apparent recognition of the force of these arguments, plaintiffs' expert eventually prepared a table that examined the rates of discipline (but not promotion) for each position, but this merely confirmed that there were many positions, occupied by a substantial portion of the workforce, in which

[2] This phenomenon was most graphically demonstrated with data from the Grand Central Terminal (GCT) Department, which alone comprises more than 5% of the workforce. Even though aggregate figures for the GCT Department showed a disparity between the rates of discipline for African-American and White employees, this seeming disparity disappeared once the data were broken down by position. Of the 50 job titles in GCT, there were 30 for which no discipline was imposed; of the remaining 20, eight showed a larger average number of disciplines for White employees than for African-Americans, and only seven showed a larger average number of disciplines for African-Americans.

there was no race-based statistical disparity and, thus, no basis for linking the challenged decisions to a common cause.

6. The District Court's Decision on Class Certification under 23(a)

In an opinion and order dated August 8, 1997, the district court denied plaintiffs' motion for class certification, finding that plaintiffs had failed to satisfy either the commonality or typicality requirements of FRCP 23(a). (A-84) In reaching this conclusion, the district court found that:

> plaintiffs' statistics, even taken most favorably to plaintiffs, cannot carry their burden here, because they fail to take account of the fact that different Metro-North positions have materially different individual rates of discipline and of promotion associated with them. . . . [W]hen these differences are taken into account, no statistically significant racial disparities, either for discipline or promotion, can be established with respect to the great majority of the positions at Metro-North.

(A-80-81) The court also concluded that, "[p]roblems of proof aside, there is a more fundamental problem with plaintiffs' approach to commonality, in that, even while seeking certification of a company-wide class, they concede that defendant's standardized, company-wide policies and procedures relating to discipline and promotion are (and were at all relevant times) non-discriminatory." (A-82)

7. Subsequent Proceedings Before the District Court

Following the completion of discovery, Metro-North filed an omnibus motion for summary judgment, which resulted in

the dismissal of the vast majority of the individual claims. The seven remaining plaintiffs then entered into an agreement with Metro-North that settled their individual claims for relief, but permitted them to appeal the decision denying their motion for class certification.[3] Since then, no one else has sought to join as a named plaintiff.

8. The Decision by the Court of Appeals for the Second Circuit on Class Certification Under Rule 23(a)

On July 29, 1999, the Second Circuit reversed the district court's finding that plaintiffs had failed to satisfy Rule 23(a) and remanded the case to the district court with instructions to consider whether the Complaints also satisfied one of the criteria for class certification under Rule 23(b).

The court concluded that, even though the challenged decisions were admittedly made on a decentralized basis, plaintiffs could sustain class claims of both disparate treatment and disparate impact by virtue of their allegation that Metro-North maintained a policy of "delegation" of subjective decision-making to a decentralized force of supervisors. In so ruling, the court found that plaintiffs' expert statistical report provided adequate evidence of class-wide discrimination, for purposes of sustaining the commonality and typicality requirements of Rule 23(a), and that, by crediting "Metro-North's expert evidence over that of the Class Plaintiffs," the district court had engaged in an inappropriate weighing of the evidence on the merits of the discrimination allegations. (A-57) In other words, the Second Circuit did not

[3] Except Veronica Caridad, whose appeal from the dismissal of her sexual harassment claim was unsuccessful, none of the plaintiffs appealed the dismissal of their claims on the merits.

criticize the substance of the district court's analysis, but held that such an analysis should not have been conducted at this stage of the proceedings.[4]

In dissent, Judge Walker criticized the panel's conclusion that "Metro-North's practice of delegating personnel decisions – plaintiffs prefer to call it 'overdelegation' – constitutes a policy or practice sufficient to satisfy the commonality requirement of Rule 23(a)." (A-64) He argued that "plaintiffs must identify a common policy or practice, to which they were all subjected, that resulted in discrimination" because "Title VII prohibits discriminatory employment practices, not an abstract policy of discrimination." (*Id.*) (quoting *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 159 n.15 (1982)).

9. *The District Court's Decision on Rule 23(b) Certification*

Pursuant to the Second Circuit's instructions, the district court thereafter entertained plaintiffs' motion for certification under either Rule 23(b)(2) or (3), as well as a motion for bifurcation of the liability and damages portions of the trial. In a Memorandum Order dated September 27, 2000, the district court denied both motions. (A-76)

The district court determined that certification under Rule 23(b)(2) was not appropriate because the relief sought was not "'exclusively or predominantly injunctive or declaratory,'" as

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[4] Nevertheless, without relying on Metro-North's expert report, the court excluded from the potential class employees occupying positions in which plaintiffs' expert had not found any statistical disparity between the percentage of disciplinary actions against African-American and White employees. No limitations were placed on the size of the class with respect to the promotion claim.

required by that Rule. (A-69) (citation omitted)[5] In so ruling, the court referred to a test recently devised by the Fifth Circuit in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 410 (5th Cir. 1998), pursuant to which Rule 23(b)(2) certification was available only if the "monetary relief were wholly 'incidental' to the requested injunctive relief." (A-70) (citation omitted) The district court also held, however, that "[e]ven . . . if some less rigorous standard than that formulated by the Fifth Circuit were applied, by any reasonable standard, and on any reasonable view of this case, the[] multiple individual determinations of damages for the numerous members of the class here proposed would overwhelm classwide injunctive issues . . . ." (A-71)

The court rejected plaintiffs' alternative motion to bifurcate the liability and damages portions of the case, finding that the individualized determinations of liability that would be necessitated by plaintiffs' disparate treatment claims would "overwhelm the liability phase of any trial nearly as much as they would overwhelm any damages phase, once again rendering class action treatment inappropriate under Rule 23(b)(2)." (A-72) It also found that plaintiffs could not satisfy Rule 23(b)(3)'s requirements because common issues did not

[5] By it terms, FRCP 23(b)(2) is available only where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." (A-87-88) The courts have consistently interpreted this requirement to mean that the claim must be "exclusively or predominately injunctive or declaratory." *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 564 (2d Cir. 1968), *vacated on other grounds*, 417 U.S. 156 (1974).

predominate,[6] and "the class action approach, far from being more efficient than individual actions, would be hopelessly complicated and prolonged (and made even more so if plaintiffs suggestions for bifurcation were adopted)." (A- 73)

10. The Second Circuit's Decision on Rule 23(b) Certification

On October 9, 2001, the Second Circuit vacated the district court's decision and remanded the case to the district court with instructions to: consider further whether the pattern and practice disparate treatment claim is appropriate for certification under Rule 23(b)(2); and to certify in any event the class-wide liability portion of that claim, as well as the disparate impact claim.[7]

The court rejected the Fifth Circuit's "incidental damages" test, which it characterized as a "bright-line" rule that would act as an absolute bar to claims seeking compensatory and punitive damages. (A-22) Instead, the court devised an "ad hoc" test, pursuant to which the district court must assess "'the relative importance of the remedies sought,'" and may allow (b)(2) certification if it finds in its "'informed, sound judicial discretion' that (1) 'the positive weight or value [to the plaintiffs] of the injunctive or declaratory relief sought is predominant even though compensatory or punitive damages are also claimed,' and (2) class treatment would be efficient

[6] FRCP 23(b)(3) conditions certification on a finding that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." (A-88)

[7] Like the previous ruling, the decision went to considerable lengths to emphasize that the court was not endorsing the merits of the underlying claims. In fact, the court observed that "two federal judges have previously expressed skepticism about the underlying merits of the claims." (A-38 n.15)

and manageable, thereby achieving an appreciable measure of judicial economy."[8] (A-23) (citation omitted)

The court accordingly remanded the case to the district court with instructions to "reconsider the propriety of (b)(2) certification" using the new ad hoc test. (A-28) The court also directed, however, that regardless of the district court's disposition of the (b)(2) issue under the ad hoc test, it must certify under (b)(2) the liability portion of the pattern and practice disparate treatment claim, as well as the disparate impact claim, and that the district court had "abused its discretion" in concluding otherwise. (A-32)[9]

REASONS FOR GRANTING THE WRIT

The *Robinson* and *Caridad* decisions raise significant issues regarding the scope of class certification that this Court has not addressed for nearly twenty years. In sharp contrast to the rulings of most other circuit courts that have addressed these issues, the Second Circuit has adopted an expansive approach that would allow class actions to proceed even though: (i) the

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[8] Explaining how the test would operate in practice, the court stated:

> [B]efore allowing (b)(2) certification a district court should, at a minimum, satisfy itself of the following: (1) even in the absence of a possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought; and (2) the injunctive or declaratory relief sought would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits.

(A-23)

[9] The court also rejected the district court's alternative finding that the named plaintiffs were no longer adequate class representatives because they had settled their claims for individual relief. (A-36-37)

challenged decisions giving rise to the underlying claims of discrimination were made separately by hundreds of different supervisors acting pursuant to policies that were admittedly non-discriminatory; (ii) the company has refuted the validity of the statistical evidence on which plaintiffs purport to link these decisions for purposes of satisfying the standards for class certification; and (iii) the determination of the individual class member's entitlement to relief would require countless adjudications of individual liability and damages issues before multiple juries.

Working in combination, the two rulings virtually guarantee that any employee alleging a pattern and practice of discrimination in the Second Circuit can proceed with a company-wide class action on the basis of little more than raw statistical data, and without regard to the practical and legal obstacles to trying such claims to completion. Whereas other circuit courts, mindful that the specter of a class action trial can bludgeon employers into accepting exorbitant settlements, have required vigorous inquiries into the factual and statistical assertions supporting class certification, the Second Circuit has required that district courts accept these assertions with little scrutiny and without regard to the countervailing arguments of the company's experts. Furthermore, whereas other circuit courts have endorsed a test that sharply limits the circumstances in which actions seeking compensatory damages may be certified under Rule 23(b)(2), the Second Circuit has rejected that test in favor of a more permissive test, coupled with the requirement that the class-wide liability and injunctive relief issues be certified for trial regardless of whether the individual claims for relief are certified.

These pending disputes among the circuit courts are largely attributable to disagreements over the interpretation of Supreme Court rulings that date back decades, before class action employment discrimination lawsuits challenged decentralized decision-making, sought compensatory damages, and were tried before juries. The Court should now revisit these issues and address them in the context of the present-day circumstances that are dividing the circuit courts.

I.
THE SECOND CIRCUIT'S REFUSAL TO CONSIDER AN EXPERT REPORT THAT CHALLENGED THE STATISTICAL ASSERTIONS SUPPORTING THE CLASS CERTIFICATION MOTION CONFLICTS WITH RULINGS OF NUMEROUS OTHER CIRCUITS

By rejecting the lower court's evaluation of the expert statistical report, and instead accepting without meaningful scrutiny the statistical report offered by plaintiffs to establish commonality and typicality under Rule 23(a), the Second Circuit adopted an approach to class certification that conflicts with recent rulings by several circuit courts, both within and outside the context of employment discrimination suits. The disagreement among the circuit courts stems from differing constructions of earlier Supreme Court decisions on the scope of the class certification inquiry.

The Second Circuit's approach is based on its application of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), which ruled that district courts could not conduct a preliminary hearing for the purpose of determining whether defendants should bear the costs of issuing a class notice. In that limited context, the

Court stated that district courts lacked "authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen*, 417 U.S. at 177. Based on *Eisen*, the Second Circuit ruled in *Caridad* that the district court could not consider the statistical report of Metro-North's expert because doing so would overlap with the evaluation of the merits.

The Second Circuit recently adhered to this approach in *Visa Check/MasterMoney Antitrust Litigation v. Visa, U.S.A. Inc.*, No. 00-7699, 2001 U.S. App. LEXIS 22480, at *18-19 (2d Cir. Oct. 17, 2001),[10] where the court sharply limited its scrutiny of an expert report which, in support of plaintiffs' motion for class certification, set forth plaintiffs' theory of class-wide antitrust injury.[11] Citing *Caridad*, the court stated that "a district court may not weigh conflicting expert evidence," but rather should merely "ensure that the basis of [plaintiffs'] expert opinion is not so flawed that it would be inadmissible as a matter of law." *Id.*

In sharp contrast to the rulings of the Second Circuit, both the Third and Seventh Circuits have specifically rejected the notion that *Eisen*'s *dicta* was ever meant to limit the scope of a district court's inquiry into whether the criteria for class certification have been satisfied. Instead, these courts have been guided by this Court's subsequent pronouncements in

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[10] Copies of unreported decisions are being provided to the Court separately.

[11] *See also Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095 (10th Cir. 2001) (adopting similar approach to class certification for claims brought under Age Discrimination in Employment Act, 29 U.S.C. §§ 621, *et seq.*, even though such claims are not governed by FRCP 23).

General Telephone Co. v. Falcon, 457 U.S. 147 (1982), where the Court rejected plaintiffs' efforts to certify a class for "across the board" claims of employment discrimination. The Court recognized that "'the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action,'" and instructed the district courts to engage in a "rigorous analysis" to determine if the criteria for class certification have been satisfied. *Id.* at 160-61 (citation omitted).

Applying *Falcon*, in *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 677-78 (7th Cir.), *cert. denied*, 122 S. Ct. 348 (2001), the Seventh Circuit overturned the granting of a motion for class certification upon finding that the district court had erroneously refused to evaluate factual assertions that supported not only the merits of the claim but also plaintiff's class certification motion. Rejecting the district court's theory that *Eisen* "adopts the approach of Rule 12(b)(6) for decisions under Rule 23," the court stated: "The proposition that a district judge must accept all of the complaint's allegations when deciding whether to certify a class cannot be found in Rule 23 and has nothing to recommend it. . . . Plaintiffs cannot tie the judge's hands by making allegations relevant to both the merits and class certification." *Id.* at 675, 677.

More recently, in upholding the denial of a motion for class certification for failure to satisfy Rule 23(b)(3)'s predominance requirement, the Third Circuit stated: "not only was it appropriate, but also necessary, for the district court to examine the factual record underlying plaintiffs' allegations in making its certification decision." *Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 189 (3d Cir. 2001). In so ruling, the court

relied heavily on the Third Circuit's decision in *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154 (3d Cir. 2001), which found, after a thorough evaluation of the pertinent factual allegations, that plaintiffs had failed to satisfy the requirements of Rule 23(b)(3). *Johnston*, 265 F.3d at 189.

Several other courts – including the Fourth, Fifth and Eleventh Circuits – have similarly discounted *Eisen*, and relied on *Falcon* as a basis for engaging in a rigorous evaluation of the grounds for class certification that may overlap with an evaluation of the merits. *See, e.g., Nelson v. United States Steel Corp.*, 709 F.2d 675, 679 (11th Cir. 1983) ("evidence relevant to the commonality requirement is often intertwined with the merits"); *Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267, 276 n.12 (4th Cir. 1980) ("*Eisen* cannot of course be read to forbid any pre-trial inquiry designed to establish the class action criteria that happens to touch on matters that may also relate to the merits of the class or individual claims as alleged."); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996) ("Going beyond the pleadings is necessary, as a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.").

Consistent with this approach, many courts have denied class certification motions in employment discrimination cases upon finding that the statistical evidence offered in support of the motion could not withstand the "rigorous analysis" mandated by *Falcon*. *See Chaffin v. Rheem Mfg. Co.*, 904 F.2d 1269, 1275-76 (8th Cir. 1990); *Stastny*, 628 F.2d at 278-80, 282; *Cooper v. Southern Co.*, No. 1:00-CV-2231-ODE, 2001 U.S. Dist. LEXIS 16809, at *63-64 (N.D. Ga. Oct. 11, 2001); *Abram v. UPS*,

200 F.R.D. 424, 433 (E.D. Wis. 2001); *Lott v. Westinghouse Savannah River Co.*, 200 F.R.D. 539, 560-61 (D.S.C. 2000); *Betts v. Sundstrand Corp.*, No. 97 C 50188, 1999 U.S. Dist. LEXIS 9743, at *11-13, *21-22 (N.D. Ill. June 21, 1999); *Gonzalez v. Brady*, 136 F.R.D. 329, 332-33 (D.D.C. 1991); *Danielson v. Fletcher*, 132 F.R.D. 489, 491-92 (N.D. Ohio 1990); *Ross v. Nikko Sec. Co. Int'l*, 133 F.R.D. 96, 97 (S.D.N.Y. 1990); *Price v. Cannon Mills*, 113 F.R.D. 66, 70-71 (M.D.N.C. 1986); *Harris v. Marsh*, 100 F.R.D. 315, 321-22 (E.D.N.C. 1983); *Ray v. Phelps Dodge Brass Co./Lee Bros.*, 35 Fair Empl. Prac. Cas. (BNA) 1004, 1006-07 (N.D. Ala. 1983).

For example, in *Chaffin v. Rheem Manufacturing Co.*, the Eighth Circuit upheld the district court's finding that the plaintiffs' statistical evidence – which compared the percentage of African American promotions in a particular department to the percentage of African-Americans in that department – was "too bareboned" to justify class certification. 904 F.2d at 1276. In so ruling, the court rejected plaintiffs' contention that the lower court's analysis of the statistical evidence "constituted an impermissible premature inquiry into the merits of [plaintiffs'] claim." *Id.* at 1275.

Similarly, in *Stastny v. Southern Bell Telephone & Telegraph Co.*, the Fourth Circuit, in overturning the lower court's certification of a broad class encompassing multiple facilities, found fault with the plaintiffs' statistical evidence of state-wide racial disparities because there was no showing that "overall disparities were paralleled in the separate facilities or even a statistically reliable sample of them." 628 F.2d at 279.

In this case, there was a particularly compelling need for similarly scrutinizing plaintiffs' statistical evidence because the

evidence was offered to establish a basis for class certification that, heretofore, had been rejected by the overwhelming majority of courts; namely, that, notwithstanding the decentralized nature of the decision-making process, "Metro-North's practice of delegating personnel decisions – plaintiffs prefer to call it 'overdelegation' – constitutes a policy or practice sufficient to satisfy the commonality requirement of Rule 23(a)." (A-64) (Walker, J. dissenting)[12] With the help of Metro-North's expert report, the district court determined that plaintiffs had failed to demonstrate commonality or typicality with this theory because the statistical disparities relied on by plaintiffs' expert varied tremendously by department, location and position and, thus, could readily be attributed to independent causes.

Consistent with the distinction between the merits and the class determination drawn by this Court in *Falcon*, as well as

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[12] Numerous authorities – including the Fourth Circuit – have denied motions for class certification of disparate treatment claims upon finding that the alleged discriminatory practices were decentralized in nature. *See, e.g., Stastny*, 628 F.2d at 279; *Abram*, 200 F.R.D. at 432-33; *Reap v. Cont'l Cas. Co.*, 199 F.R.D. 536, 544-45 (D.N.J. 2001); *Cooper*, 2001 U.S. Dist. LEXIS 16809, at *106-07; *Wright v. Circuit City Stores, Inc.*, 201 F.R.D. 526, 541-42, 544 (N.D. Ala. 2001); *Lott*, 200 F.R.D. at 557-61; *Zachery v. Texaco Exploration & Prod., Inc.*, 185 F.R.D. 230, 238-40 (W.D. Tex. 1999); *Betts*, 1999 U.S. Dist. LEXIS 9743, at *11-13, *21-22; *Appleton v. Deloitte & Touche LLP*, 168 F.R.D. 221, 231-32 (M.D. Tenn. 1996); *Brooks v. Circuit City Stores, Inc.*, 71 Fair Empl. Prac. Cas. (BNA) 102, 105 (D. Md. 1996). *But see Shipes v. Trinity Indus.*, 987 F.2d 311, 316 (5th Cir.) (holding that a discrimination claim can be certified as a class action when the decision-making process is found to be "entirely subjective"), *cert. denied*, 510 U.S. 991 (1993); *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 561, 563 (8th Cir. 1982) (certifying class claims where a staff of white supervisors made promotional decisions based primarily on subjective criteria), *cert. denied*, 460 U.S. 1083 (1983).

the approach taken in *Chaffin* and *Stastny*, Metro-North's expert focused, not on the merits of whether Metro-North was engaged in a pattern and practice of discrimination, but on whether there was statistical evidence to support the inference that the acts of discrimination alleged by the named plaintiffs were occurring on a class-wide basis. *See also Hopewell v. Univ. of Pittsburgh*, 79 F.R.D. 689, 694 n.2 (W.D. Pa. 1978) ("It is only proper that statistics be given the same rigorous analysis in a Rule 23 determination as would be given on the merits. The question here is not what the statistics prove, but rather what they mean."). By refusing to accept Metro-North's expert report for this limited purpose, the Second Circuit has effectively determined that, whenever an employer's challenge to the plaintiffs' statistical showing overlaps to any extent with the evaluation of the merits, that challenge must be rejected at the class certification stage, and the plaintiffs' statistical showing must be accepted without further scrutiny.

The court's legal position not only differs sharply from the positions of other circuit courts,[13] but also has huge public policy implications. Numerous courts, including the Third Circuit Court of Appeals, have observed that granting class certification merely because the Rule 23 issues overlap with the

[13] The *Caridad* decision cannot even be harmonized with prior precedent in the Second Circuit. Prior to *Caridad*, the Second Circuit's leading authority on this issue, *Sheehan v. Purolator, Inc.*, 839 F.2d 99, 103 (2d Cir.), *cert. denied*, 488 U.S. 891 (1988), upheld the denial of a motion for class certification and, in so doing, approved the lower court's findings that: (i) the omission of variables from a regression analysis reduced the probative value of plaintiffs' statistical evidence; and (ii) plaintiffs' statistical analysis failed to take into account various relevant non-discriminatory factors such as job level, education and work experience.

merits "may generate unwarranted pressure to settle nonmeritorious or marginal claims." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 168 (3d Cir. 2001) (citing *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir.), *cert. denied*, 516 U.S. 867 (1995) and *In re GMC Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784-85 (3d Cir.), *cert. denied*, 516 U.S. 824 (1995)); *see Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1241 n.21 (11th Cir. 2000) ("Once one understands that the issues involved in the instant case are predominantly case-specific in nature, it becomes clear that there is nothing to be gained by certifying this [discrimination] case as a class action; nothing, that is, except the blackmail value of a class certification that can aid the plaintiffs in coercing the defendant into a settlement."), *cert. denied*, 121 S. Ct. 1354 (2001); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle . . . .").

Even the Second Circuit recognized the "intense pressures to settle that often follow a class certification decision." (A-38 n.15) *See also Visa Check/MasterMoney Antitrust Litig. v. Visa, U.S.A. Inc.*, No. 00-7699, 2001 U.S. App. LEXIS 22480, at *59 (2d Cir. Oct. 17, 2001) (Jacobs, J., dissenting) ("Even a defendant who is innocent and holy may rationally choose to pay a few hundred million dollars in settlement of a class action rather than 'run the risk of ruinous liability.'"). Yet this would be precisely the result if plaintiffs could automatically proceed to a jury trial of company-wide pattern and practice discrimination claims without any regard to whether the claims of the named plaintiffs (the vast majority of which had

already been found entirely lacking in merit in this case) were representative of the claims of an aggrieved class.

In short, the disagreement among the circuit courts on the scope of the Rule 23 inquiry has enormous legal and practical implications. This Court should, therefore, grant certiorari in order to reaffirm and clarify the discretionary authority of the district courts to analyze and evaluate fully the evidence supporting and opposing class certification motions, as it originally directed in *Falcon*.

II.

THE SECOND CIRCUIT'S STANDARD FOR CLASS CERTIFICATION UNDER RULE 23(b)(2) CONFLICTS WITH THE RULINGS OF OTHER CIRCUIT COURTS

The ruling in *Robinson* has widened a gap that was already developing among the circuit courts as to the proper application of Rule 23(b)(2) in the aftermath of the Civil Rights Act Amendments of 1991, which for the first time permitted claims for recovery of compensatory and punitive damages, and the right to a jury trial, in Title VII suits alleging employment discrimination. In contrast to the Fifth Circuit, which has sharply limited the grounds for Rule 23(b)(2) certification, the Second Circuit has now adopted an "ad hoc" test which will permit more widespread certification under Rule 23(b)(2). Moreover, by virtue of its corollary ruling on bifurcation, the Second Circuit will now automatically permit certification of the liability portion of a pattern and practice claim, a practice that no other circuit court has endorsed and that the Fifth Circuit expressly prohibited.

A. The Second Circuit's "Ad Hoc" Test Conflicts with the "Incidental Damages" Test Adopted by the Fifth, Sixth, Seventh, and Eleventh Circuits

In *Allison v. Citgo Petroleum Corp*, 151 F.3d 402 (5th Cir. 1998), the Fifth Circuit held that, notwithstanding the plaintiffs' satisfaction of the criteria for certification under Rule 23(a), the requirements of Rule 23(b)(2) were not satisfied in an employment discrimination suit brought on behalf of a class of African-American employees and job applicants who were seeking injunctive, declaratory and monetary relief and punitive damages for alleged discrimination in hiring, promotion, compensation and training policies at the defendant's manufacturing facilities.

Building on the requirement that, to satisfy Rule 23(b)(2), claims for class-wide injunctive and declaratory relief must predominate, *see* FED. R. CIV. P. 23(b)(2) advisory committee's notes (*supra* note 5), the court held that "monetary relief predominates," and therefore Rule 23(b)(2) certification is not available, "unless it is incidental to requested injunctive or declaratory relief. By incidental, we mean damages that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief." *Allison*, 151 F.3d at 415.[14]

[14] The *Allison* court identified three additional factors that should be applied to define "incidental" damages:

> First, such damages should be of the kind to which class members would be automatically entitled. Second, such damages should be computable by "objective standards," and not standards significantly reliant upon "the intangible, subjective differences of each class member's circumstances."

(continued...)

Applying its "incidental damages" test, the *Allison* court "[had] little trouble affirming the district court's finding that the plaintiffs' claims for compensatory and punitive damages are not sufficiently incidental to the injunctive and declaratory relief being sought to permit them in a (b)(2) class action." *Allison*, 151 F.3d at 416. With respect to the claims for compensatory damages, the court observed that "[t]he very nature of these damages, compensating plaintiffs for emotional and other intangible injuries, necessarily implicates the subjective differences of each plaintiff's circumstances; they are an individual, not classwide, remedy." *Id.* at 417. The court concluded that "[g]iven the degree to which recovery of compensatory and punitive damages requires individualized proof and determinations, they clearly do not qualify as incidental damages in this case." *Id.* at 418.

The Fifth Circuit recently reaffirmed the use of the "incidental damages" test in *Smith v. Texaco, Inc.*, 263 F.3d 394, 408 & n.16 (5th Cir. 2001), and the Seventh Circuit and numerous district courts throughout the country have also endorsed the use of the test in employment discrimination lawsuits. *See Lemon v. Int'l Union of Operating Eng'rs, Local No. 139*, 216 F.3d 577, 580-82 (7th Cir. 2000) (vacating Rule 23(b)(2) certification of Title VII class because monetary damages sought by plaintiffs were not incidental to requested equitable relief); *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 898 (7th Cir. 1999) (endorsing *Allison*'s principal holding that "[i]f Rule 23(b)(2) ever may be used when the plaintiff class demands

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[14] (...continued)

Third, such damages should not necessitate additional hearings. *Miller v. Hygrade Food Prods. Corp.*, 198 F.R.D. 638, 641 (E.D. Pa. 2001) (quoting *Allison*, 151 F.3d at 415).

compensatory or punitive damages, that step would be permissible only when monetary relief is incidental to the equitable remedy");[15] *Robertson v. Sikorsky Aircraft Corp.*, No. 3:97 CV 1216 (GLG), 2001 U.S. Dist. LEXIS 11662, at *24-29 (D. Conn. July 5, 2001); *Osgood v. Harrah's Entm't, Inc.*, 202 F.R.D. 115, 128-31 (D.N.J. 2001); *Miller*, 198 F.R.D. at 641-42; *Adams v. Henderson*, 197 F.R.D. 162, 171-72 (D. Md. 2000).

The Sixth and Eleventh Circuits have followed *Allison* in other contexts. *See Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001) (relying on *Allison* in concluding that Rule 23(b)(2) was not satisfied for claims by disabled individuals challenging administration of the state's Medicaid program, because plaintiffs did "not seek damages as a 'group remedy'") (citation omitted); *Butler v. Sterling, Inc.*, 210 F.3d 371, *reported in full at*, No. 98-3223, 2000 WL 353502, at *6 (6th Cir. Mar. 31, 2000) (citing *Allison* and affirming denial of FRCP 23(b)(2) certification of claims under the Truth in Lending Act because

[15] The Seventh Circuit cautioned, however, that even if a district were to rule that the incidental damages test was satisfied, the court would still have to consider whether Rule 23(b)(2) certification is ever appropriate for a claim seeking compensatory damages, as the Supreme Court has not previously addressed this question. *See Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994). Most courts that have permitted or contemplated Rule 23(b)(2) certification of suits containing claims for compensatory damages, including the Second Circuit (*see* A-25-26), have presumed that an opt-out notice would be used to protect the rights of class members who might wish to proceed separately with their claims for compensatory relief. The Supreme Court has expressed skepticism, however, as to whether Rule 23 authorizes opt-out notices for (b)(2) classes. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 n.14 (1974) ("By its terms subdivision (c)(2) is inapplicable to class actions for injunctive or declaratory relief maintained under subdivision (b)(2).").

monetary relief predominated); *see also Smith v. Univ. of Wash. Law School*, 233 F.3d 1188, 1196 (9th Cir. 2000) (affirming decertification of 23(b)(2) class and stating that monetary damages claim could not be certified because "damages would hardly be incidental when the prospective relief portion of the action had become moot"), *cert. denied*, 121 S. Ct. 2192 (2001).

In sharp contrast to these rulings, the Second Circuit has now rejected *Allison*'s incidental damages test in favor of its "ad hoc" test, which assesses "'the relative importance of the remedies sought, given all the facts and circumstances of the case.'" (A-23) (citation omitted) The test has been applied in a few district court cases, but thus far has not been endorsed by any other circuit court in Civil Rights Act cases. *See Reeb v. Ohio Dep't of Rehab. & Corr. Belmont Corr. Inst.*, No. C200-CV-0074, 2001 U.S. Dist. LEXIS 17312, at *21-23 (S.D. Ohio Oct. 24, 2001); *Hoffman v. Honda of Am. Mfg., Inc.*, 191 F.R.D. 530, 535-37 (S.D. Ohio 1999); *see also Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1105 (10th Cir. 2001) (adopting "ad hoc" approach to evaluation of motion to certify class claims under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621, *et seq.*).[16]

Under the Second Circuit's test, Rule 23(b)(2) certification will extend to any claim seeking individual monetary relief as long as the claims for injunctive and declaratory relief are significant enough that the plaintiffs might have pursued them in any event. (*See* A-23) The rule makes no allowance for the

[16] Outside the employment discrimination context, at least two circuit courts have applied a "facts and circumstances" test in concluding that claims for monetary damages predominated, and, thus, that Rule 23(b)(2) certification was unavailable. *See Boughton v. Cotter Corp.*, 65 F.3d 823, 827 (10th Cir. 1995); *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1008 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986).

fact that in cases such as this one, which challenge the decisions of hundreds of supervisors acting pursuant to a decentralized decision-making process, the second phase of the trial will ultimately overwhelm the class-wide liability phase. Indeed, each class member's claim for individual relief will require a separate adjudication, before a separate jury, based on the unique facts and circumstances pertaining to the particular supervisor responsible for the employment decisions pertaining to that class member.[17]

At a minimum, the Second Circuit's test will generate different outcomes to class certification motions in employment discrimination cases than the rule devised by the Fifth Circuit and adopted by the Seventh Circuit. In order to avoid such conflicting results, the Supreme Court must determine which one of these tests, or whether an alternative test for certification under Rule 23(b)(2), should govern.

B. The Second Circuit's Approach Widens a Split Among the Circuit Courts on the Use of Partial or Hybrid Certification

Prior to the Second Circuit's decision in *Robinson*, a number of courts had expressed the concern that an unquestioning

[17] Although the Second Circuit gave short shrift to the issue (A-32 n.13), there is a serious question as to whether such multiple trials would run afoul of the Seventh Amendment's Reexamination Clause. *Compare* Daniel F. Piar, *The Uncertain Future of Title VII Class Actions After the Civil Rights Act of 1991*, 2001 BYU L. REV. 305, 337-46 (2001), *with* Lesley Frieder Wolf, *Evading Friendly Fire: Achieving Class Certification After the Civil Rights Act of 1991*, 100 COLUM. L. REV. 1847, 1864-68, 1876-79 (2000). Elsewhere, courts have construed the Clause narrowly, so as to prohibit the type of multiple examinations of overlapping factual questions that occur here. *See, e.g., Allison*, 151 F.3d at 422-25; *Ramirez v. DeCoster*, 194 F.R.D. 348, 354 & n.4 (D. Me. 2000).

application of *Allison*'s "incidental damages" test could have the unintended effect of precluding certification of the same types of lawsuits that might otherwise have been certified under Rule 23(b)(2) prior to the Civil Rights Act Amendments. In an effort to address this concern, some courts have sought imaginative ways to permit certification, notwithstanding the application of the "incidental damages" test. For example, the Seventh Circuit left with the district court the discretion to consider hybrid certification of the class-wide liability portion of the case under Rule 23(b)(2) and of the individual relief portion under Rule 23(b)(3). *See Jefferson v. Ingersoll, Int'l Inc.*, 195 F.3d 894 (7th Cir. 1999); *Lemon v. Int'l Union of Operating Eng'rs, Local No. 139*, 216 F.3d 577 (7th Cir. 2000).

The Second Circuit's approach goes well beyond the Seventh Circuit's approach. Not only does it reject *Allison*'s incidental damages test altogether, but it requires certification of the class-wide liability portion of a pattern and practice claim without regard to whether the individual relief portion of the case is suitable for class certification under Rule 23(b)(2) or (b)(3). The court reached this result by relying on FRCP 23(c)(4), which states that "[w]hen appropriate . . . an action may be brought or maintained as a class action with respect to particular issues." (A-29)

The Fifth Circuit expressly rejected this approach in *Allison*, where the plaintiffs moved, pursuant to Rule 23(c)(4), to bifurcate the class-wide liability portion of the case from the individual relief stage, and to certify the former under Rule 23(b)(3). Citing its earlier ruling in *Castano*, the Fifth Circuit characterized this effort as an "attempt to 'manufacture predominance through the nimble use of subdivision (c)(4).'"

Allison, 151 F.3d at 422 (citation omitted). As *Castano* and *Allison* observed, "'reading rule 23(c)(4) as allowing a court to sever issues until the remaining common issue predominates over the remaining individual issues would eviscerate the predominance requirement of rule 23(b)(3); the result would be automatic certification in every case where there is a common issue, a result that could not have been intended.'"[18] *Id.* (citation omitted)

The same observations could be made here. The Second Circuit's cavalier attitude toward partial certification turns a blind eye to the profound practical effects of this device. As the Fifth Circuit observed: "[W]e should not condone a certification-at-all-costs approach . . . for the simple purpose of forcing a settlement. Settlements should reflect the relative merits of the parties' claims, not a surrender to the vageries of an utterly unpredictable and burdensome litigation procedure." *Allison*, 151 F.3d at 422 n.17; *see also Visa Check/MasterMoney Antitrust Litig. v. Visa, U.S.A. Inc.*, No. 00-7699, 2001 U.S. App. LEXIS 22480, at *70-71 (2d Cir. Oct. 17,

[18] Some district courts, like the Second Circuit, have certified the class-wide liability portion of the case before determining whether the balance of the case would be certified, but in doing so have recognized that, in order for the case to be tried before a jury, the class must include claims for compensatory or punitive damages. *See, e.g., Butler v. Home Depot*, No. C-94-4335, 1996 U.S. Dist. LEXIS 3370, at *18-19 (N.D. Cal. Jan. 25, 1996); Piar, *supra* note 16, at 339-41; *see also* 42 U.S.C. § 1981a(c) (providing right to jury trial in claims seeking damages). The Second Circuit decision makes no allowance for this issue. It merely instructs the district court to conduct a jury trial with respect to the class-wide liability claims, without explaining why a jury should try such claims in a case where the class representatives' individual claims were already settled and punitive damages are unavailable. (A-35-38)

2001) (Jacobs, J., dissenting) ("[C]ertification leads to unfairness and injustice: if the district court later finds that a trial is unmanageable, the named plaintiffs and their counsel lose nothing, but in the meantime they have in hand the means to extract a favorable settlement of what may be weak claims.").

Accordingly, in conjunction with any ruling on the appropriate test for Rule 23(b)(2) certification, this Court should also resolve the split among the circuit courts as to the circumstances, if any, under which bifurcation and partial certification are appropriate in employment discrimination lawsuits.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Docket Nos. 00-9417(L), 00-9423(C)

CHARLES ROBINSON, SHARON E. MACK, JAMES OLIVER, DARRYLL F. SIMPSON, VERONICA CARIDAD, DONALD HINES, JAMES JACKSON, LORD TAYLOR, EARL VAUGHN, DANIEL CANADA, MARVIN EDWARDS, ERIC JONES and RAYMOND NORRIS, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

—v.—

METRO-NORTH COMMUTER RAILROAD CO.,

Defendant-Appellee.

Before:

WALKER, *Chief Judge*,
CALABRESI and POOLER, *Circuit Judges*.

Plaintiffs-appellants appeal from a September 29, 2000 judgment of the United States District Court for the Southern District of New York (Jed S. Rakoff, *District Judge*) denying plaintiffs' motions for class certification and bifurcation and directing entry of judgment dismissing the action. *See Robinson v. Metro-North Commuter R.R.*, 197 F.R.D. 85 (S.D.N.Y. 2000).

For the reasons set forth below, the judgment is vacated and the district court is instructed to certify plaintiffs' disparate impact claim for Rule 23(b)(2) class treatment, *see* Fed. R. Civ. P. 23(b)(2), and to consider whether the pattern-or-practice disparate treatment claim is appropriate for (b)(2) certification in light of the standard we set forth today. If the court determines that (b)(2) certification of the pattern-or-practice claim is inappropriate, it shall bifurcate the claim and certify the liability stage of that claim for (b)(2) class treatment, *see* Fed. R. Civ. P. 23(c)(4)(A).

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JOHN M. WALKER, JR., *Chief Judge*:

Plaintiffs-appellants (the "Class Plaintiffs") appeal from a September 29, 2000 judgment of the United States District Court for the Southern District of New York (Jed S. Rakoff, *District Judge*) that denied Class Plaintiffs' motions for class certification and bifurcation, and that directed entry of judgment in favor of defendant-appellee Metro-North Commuter Railroad ("Metro-North"). *See Robinson v. Metro-North Commuter R.R.*, 197 F.R.D. 85 (S.D.N.Y. 2000) ("*Robinson II*").

The district court's judgment dismissing the action is vacated. On remand, the district court is instructed to certify the Class Plaintiffs' disparate impact claim for Rule 23(b)(2) class treatment, *see* Fed. R. Civ. P. 23(b)(2), and consider whether the pattern-or-practice disparate treatment claim is appropriate for (b)(2) certification in light of the standard we set forth herein. If the court determines that (b)(2) certification of the pattern-or-practice claim is inappropriate, it shall bifurcate the claim, *see* Fed. R. Civ. P. 42(b), and certify the liability stage of the claim for (b)(2) class treatment, *see* Fed. R. Civ. P. 23(c)(4)(A).

BACKGROUND

A. The Allegations

The background of this case is substantially detailed in *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 286-90 (2d Cir. 1999) ("*Caridad*") (reversing the denial of class certification, *see Robinson v. Metro-North Commuter R.R.*, 175 F.R.D. 46 (S.D.N.Y. 1997) ("*Robinson I*")). Only those facts relevant to this appeal are recited below.

The Class Plaintiffs are present and former Metro-North employees who are African American. They bring this putative class action against defendant Metro-North on behalf of "all African-American employees of Metro-North for the period from 1985 through 1996—an estimated 1,300 persons." *Caridad*, 191 F.3d at 286. Metro-North is a public benefit corporation responsible for providing commuter rail transportation between New York City and its northern suburbs. It has approximately 5,700 employees in 220 different occupations spread over 37 departments.

The Class Plaintiffs assert both pattern-or-practice disparate treatment and disparate impact claims pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* Specifically, they challenge Metro-North's company-wide policy of delegating to department supervisors discretionary authority to make employment decisions related to discipline and promotion. Relying on statistical and anecdotal evidence, the Class Plaintiffs argue that this delegated authority has been "exercised in a racially discriminatory manner and has a disparate impact on African-American employees." *Caridad*, 191 F.3d at 286; *see Robinson I*, 175 F.R.D. at 47. In their prayer for relief, the Class Plaintiffs seek "injunctive and equitable relief for the class as a whole," including back and front pay, and also "compensatory damages for individual members of the class who were allegedly the victims of individual acts of intentional discrimination." *Robinson II*, 197 F.R.D. at 87. No request for punitive damages was made.

B. The Earlier Appeal

In August 1997, the district court denied an earlier request for class certification because it held that the Class Plaintiffs had failed to satisfy the prerequisites for a class action set out in Rule 23(a)(2), (3).[1] Specifically,

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[1] Rule 23(a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable [numerosity], (2) there are questions of law or fact common to the class [commonality], (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class [typicality], and (4) the representative parties will fairly and adequately protect the interests of the class [adequacy of representation].

Fed. R. Civ. P. 23(a).

the district court found that the Class Plaintiffs had failed to demonstrate commonality and typicality. *See Robinson I*, 175 F.R.D. at 47-49.

"The commonality requirement is met if plaintiffs' grievances share a common question of law or of fact." *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997) (per curiam). Typicality "requires that the claims of the class representatives be typical of those of the class, and is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Id.* (internal quotation marks omitted).

Central to the district court's finding that the Class Plaintiffs had failed to demonstrate commonality and typicality were the following: (1) Metro-North satisfied the district court that the "plaintiffs' statistics are inadequate to carry their burden of establishing commonality as to the company-wide class" because "they fail to take account of the fact that different Metro-North positions have materially different individual rates of discipline and of promotion associated with them;" and (2) Metro-North's "overdelegation" of promotion and discipline authority to supervisors is not sufficient to make out a pattern or practice of racial discrimination. *Robinson I*, 175 F.R.D. at 48-49. We disagreed and held that: (1) the " 'statistical dueling' " between the Class Plaintiffs and Metro-North was "not relevant to the certification determination," and that the Class Plaintiffs' statistical report, "in conjunction with the anecdotal evidence, satisfie[d] the Class Plaintiffs' burden of demonstrating" commonality and typicality; and (2) the delegation of discretionary authority to supervisors for discipline and promotion constitutes a policy or practice sufficient to satisfy the commonality requirement.

Caridad, 191 F.3d at 292-93.[2] The case was remanded for the district court to consider "whether the requirements of Rule 23(b) [were] met." *Id.* at 293.

C. The District Court's Ruling After Remand

Following remand, the Class Plaintiffs moved in the district court for (b)(2) class certifications of both the pattern-or-practice disparate treatment claim and the disparate impact claim. *See* Fed. R. Civ. P. 23(b)(2). As an alternative to class certification of the pattern-or-practice claim in its entirety, Class Plaintiffs sought bifurcation of the claim between the liability and remedial stages, and (b)(2) class certification of just the liability stage. *See* Fed. R. Civ. P. 23(c)(4)(A) (permitting class certification of "particular issues").

The district court denied the motions. Relying on the Fifth Circuit's recent decision in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998), the district court reasoned that (b)(2) certification of the entire pattern-or-practice disparate treatment claim was inappropriate because the individualized compensatory damage issues would predominate over the class-wide equitable relief question, *see Robinson II*, 197 F.R.D. at

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[2] I dissented in part. My disagreement with the *Caridad* majority was not with that portion of the opinion holding that consideration of the dueling expert reports was error, but with that portion that held that Metro-North's practice of delegating personnel decisions constitutes a policy or practice sufficient to satisfy the commonality requirement of Rule 23(a). *See Caridad*, 191 F.3d at 297 (Walker, J., dissenting in part). It was my view that "in the absence of some affirmative practice leading to discrimination by Metro-North—beyond the quite normal management practice of delegating personnel responsibility to departmental managers under the umbrella of an established anti-discrimination policy"—the district court did not abuse its discretion in concluding that the Class Plaintiffs had failed to demonstrate commonality and typicality. *Id.*

87-88. Central to the district court's conclusion was its belief that

> determination of the damages suffered by individual members of the class would require individualized proof and proceedings to determine whether each such member suffered intentional discrimination on the part of his or her department manager, what injuries each such member thereby suffered, what individualized damages were appropriate to redress such injuries, etc.

Id. at 88. "[The] multiple individual determinations of damages for the numerous members of the class," the district court concluded, "would overwhelm classwide injunctive issues, from both the standpoint of the individual plaintiffs and the standpoint of the Court." *Id.*

With respect to the Class Plaintiffs' alternative request that the pattern-or-practice claim be bifurcated and the liability stage certified for class treatment as a (b)(2) class, the district court reasoned that "the[ ] individual determinations will overwhelm the liability phase of any trial nearly as much as they would overwhelm any damages phase, once again rendering class action treatment inappropriate under Rule 23(b)(2)." *Id.* The district court based this conclusion on its belief that the liability phase would require an individualized determination of each of the "allegedly discriminatory acts of particular department managers in particular individual situations." *Id.*

The district court did not set forth a basis for denying (b)(2) certification of the disparate impact claim.

DISCUSSION

At the outset, we observe that this appeal does not involve consideration of the merits of the case. *See, e.g., Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). Rather, it concerns whether the district court abused its discretion in denying class certification. *See Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 570-72 (2d Cir. 1982). And, in particular, it requires us to consider how the passage of the Civil Rights Act of 1991 ("the 1991 Act"), *see* Pub. L. No. 102-166, 105 Stat. 1071, affected the class certification analysis in employee discrimination cases. *See generally* Daniel F. Piar, *The Uncertain Future of Title VII Class Actions After the Civil Rights Act of 1991*, 2001 BYU L. Rev. 305. As we discuss below, contrary to both Metro-North's arguments on appeal and the Fifth Circuit's recent decision in *Allison*, we find that the changes made by the 1991 Act are not fatal to class treatment of employment discrimination claims. *But see Allison*, 151 F.3d at 409-10.

To understand why, it is first necessary to consider the changes brought about by the 1991 Act and to review the elements and evidentiary requirements for pattern-or-practice disparate treatment claims and disparate impact claims.

I. THE 1991 ACT AND TITLE VII CLAIMS GENERALLY

A. The 1991 Act

Prior to the passage of the 1991 Act, a plaintiff seeking a monetary award for disparate treatment[3] and disparate

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[3] Disparate treatment claims under Title VII generally are of two types: (1) individual disparate treatment claims, which primarily follow the the burden-shifting framework set out in *McDonnell*

impact claims under Title VII could recover only back pay and front pay. Because back pay and front pay have historically been recognized as equitable relief under Title VII, neither party was entitled to a jury trial; both disparate treatment and disparate impact claims were tried to the bench. *See, e.g.*, *Lehman v. Nakshian*, 453 U.S. 156, 164 (1981); *Lincoln v. Bd. of Regents of Univ. Sys. of Ga.*, 697 F.2d 928, 934 (11th Cir. 1983); *Moore v. Sun Oil Co. of Pa.*, 636 F.2d 154, 156 (6th Cir. 1980); *Slack v. Havens*, 522 F.2d 1091, 1094 (9th Cir. 1975); *see also Pollard v. E.I. du Pont de Nemours & Co.*, 121 S.Ct. 1946, 1951-52 (2001) (holding that front pay is an equitable remedy). *But see Setser v. Novack Inv. Co.*, 638 F.2d 1137, 1142 (8th Cir.) (holding that back pay is a legal remedy for which the right to a jury trial exists), *vacated in part on other grounds*, 657 F.2d 962 (8th Cir. 1981) (en banc).

The 1991 Act enhanced Title VII's remedial scheme for disparate treatment claims. In addition to back pay and front pay, it authorized the recovery of compensatory and punitive damages in disparate treatment disputes, *see* 42 U.S.C. § 1981a(a)(1), and afforded a jury trial where these additional remedies are sought, *see* 42 U.S.C. § 1981a(c). The 1991 Act did not alter the remedial structure for disparate impact claims.

Douglas Corp. v. Green, 411 U.S. 792 (1973); and (2) pattern-or-practice disparate treatment claims that center on group-wide allegations of intentional discrimination. *See generally* 1 Arthur Larson et al., *Employment Discrimination* § 8.01[4], at 8-13 (2d ed. 2001) (noting that "[t]he *McDonnell Douglas* pattern of proof is ill-suited to establishing [pattern-or-practice claims]").

B. Proving Title VII Claims

1. Pattern-or-Practice Disparate Treatment Claims

Pattern-or-practice disparate treatment claims focus on allegations of widespread acts of intentional discrimination against individuals. To succeed on a pattern-or-practice claim, plaintiffs must prove more than sporadic acts of discrimination; rather, they must establish that intentional discrimination was the defendant's "standard operating procedure." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977).

Generally, a pattern-or-practice suit is divided into two phases: liability and remedial.[4] *See id.* at 360-62. At the liability stage, the plaintiffs must produce sufficient evidence to establish a prima facie case of a policy, pattern, or practice of intentional discrimination against the protected group. *See id.* at 360. "Plaintiffs have typically depended upon two kinds of circumstantial evidence to establish the existence of a policy, pattern, or practice of intentional discrimination: (1) statistical evidence aimed at establishing the defendant's past treatment of the protected group, and (2) testimony from protected class members detailing specific instances of discrimination."[5]

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[4] Referring to the first phase of a pattern-or-practice disparate treatment suit as the "liability phase" is something of a misnomer because, as we discuss, the remedial phase also implicates questions of liability, albeit liability to each individual class member rather than to the class as a whole. *See Dillon v. Coles*, 746 F.2d 998, 1004 (3d Cir. 1984).

[5] The heavy reliance on statistical evidence in a pattern-or-practice disparate treatment claim distinguishes such a claim from an individual disparate treatment claim proceeding under the *McDonnell Douglas* framework. *See Bell v. EPA*, 232 F.3d 546, 553 (7th Cir. 2000) ("In a pattern and practice disparate treatment case, statistical evidence constitutes the core of a plaintiff's prima facie case. Within

1 Arthur Larson et al., *Employment Discrimination* § 9.03[1], at 9-18 (2d ed. 2001); *see Mozee v. Am. Commercial Marine Serv. Co.*, 940 F.2d 1036, 1051 (7th Cir. 1991).

Statistics alone can make out a prima facie case of discrimination if the statistics reveal "a gross disparity in [the] treatment of workers based on race." *Lopez v. Laborers Int'l Union, Local No. 18*, 987 F.2d 1210, 1214 (5th Cir. 1993) (internal quotation marks omitted); *see also Ardrey v. United Parcel Serv.*, 798 F.2d 679, 684 (4th Cir. 1986) ("Since strong statistical evidence, without anecdotal evidence, may in some cases form a prima facie case, a defendant's successful rebuttal of each alleged instance of discrimination weakens, but does not defeat, a plaintiff's class claim. Neither statistical nor anecdotal evidence is automatically entitled to reverence to the exclusion of the other.").

If the plaintiffs satisfy this prima facie requirement, "[t]he burden [of production] then shifts to the employer to defeat [it] . . . by demonstrating that the [plaintiffs'] proof is either inaccurate or insignificant." *Teamsters*, 431 U.S. at 360.

> Three basic avenues of attack are open to the defendant challenging the plaintiff[s'] statistics, namely assault on the source, accuracy, or probative force. The defendant can present its own statistical summary treatment of the protected class and try to con-

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the *McDonnell Douglas* individual disparate treatment model, however, statistical evidence is only one small part of a substantial web of evidence indicating pretext."); *see also Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1217 (3d Cir. 1995) (citing *Bruno v. W.B. Saunders Co.*, 882 F.2d 760, 766 (3d Cir. 1990), for the proposition that statistics in an individual disparate treatment case, in "contrast [to a class-action or pattern-and practice case], . . . need not be so finely tuned" (alterations in original)).

> vince the fact finder that these numbers present a more accurate, complete, or relevant picture than the plaintiff[s]' statistical showing. Or the defendant can present anecdotal and other non-statistical evidence tending to rebut the inference of discrimination. The prudent defendant will follow all three routes if possible, presenting its own version of the numbers game, attempting to undermine the plaintiff[s]' version with specific attacks on [the] validity of the plaintiff[s]' statistics, and garnering non-statistical evidentiary support as well.

Larson, *supra*, § 9.03[2], at 9-23 to 9-24 (footnote omitted).

Once the defendant introduces evidence satisfying this burden of production, the trier of fact then must consider the evidence introduced by both sides to determine whether the plaintiffs have established by a preponderance of the evidence that the defendant engaged in a pattern or practice of intentional discrimination. *See Teamsters*, 431 U.S. at 336. Should the plaintiffs prove a pattern or practice of discrimination, the court may proceed to fashion class-wide injunctive relief. *See id.* at 361; *Dillon v. Coles*, 746 F.2d 998, 1004 (3d Cir. 1984).

If individual relief such as back pay, front pay, or compensatory recovery is sought in addition to class-wide injunctive relief, the court must conduct the "remedial" phase. Class members enter this second phase with a presumption in their favor "that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy." *Teamsters*, 431 U.S. at 362.

The effect of the presumption from the liability stage is to substantially lessen each class member's eviden-

tiary burden relative to that which would be required if the employee were proceeding separately with an individual disparate treatment claim under the *McDonnell Douglas* framework. *Cf. Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Rather than having to make out a prima facie case of discrimination and prove that the employer's asserted business justification is merely a pretext for discrimination, *see, e.g., Scarlett v. Seaboard Coast Line R.R. Co.*, 676 F.2d 1043, 1053 (5th Cir. 1982), a class member at the remedial stage of a pattern-or-practice claim need only show that he or she suffered an adverse employment decision "and therefore was a potential victim of the proved [class-wide] discrimination." *Teamsters*, 431 U.S. at 362. The burden of persuasion then shifts to "the employer to demonstrate that the individual [was subjected to the adverse employment decision] for lawful reasons." *Id.*

If the employer is unable to establish a lawful reason for an adverse employment action, the employee is entitled to individualized equitable relief, which may include back pay and front pay. Class members who seek compensatory damages in addition to individualized equitable relief must then prove that the discrimination caused them "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, [or] other nonpecuniary losses." 42 U.S.C. § 1981a(b)(3).

2. Disparate Impact Claims

Like pattern-or-practice disparate treatment claims, disparate impact claims "are attacks on the systemic results of employment practices." *Segar v. Smith*, 738 F.2d 1249, 1267 (D.C. Cir. 1984). However, where the inquiry in a pattern-or-practice disparate treatment claim is focused on determining the existence of discrimina-

tory intent, disparate impact claims are concerned with whether employment policies or practices that are neutral on their face and were not intended to discriminate have nevertheless had a disparate effect on the protected group. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (stating that an employer's "good intent" is irrelevant to a disparate impact claim). "The doctrine seeks the removal of employment obstacles, not required by business necessity, which create built-in headwinds and freeze out protected groups from job opportunities and advancement." *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1274 (11th Cir. 2000) (internal quotation marks omitted).

Disparate impact claims involve three stages of proof. The first is the prima facie showing of disparate impact. It requires plaintiffs to establish by a preponderance of the evidence that the employer "uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(k)(1)(A)(i). To make this showing, a plaintiff must (1) identify a policy or practice, (2) demonstrate that a disparity exists, and (3) establish a causal relationship between the two. *See Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 111 (2d Cir. 2001). "Allegations which contend only that there is a bottom line racial imbalance in the work force are insufficient." *Brown v. Coach Stores, Inc.*, 163 F.3d 706, 712 (2d Cir. 1998); *see, e.g., Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657 (1989) (holding that the challenged employment practice caused the disparity).

As with the liability phase of a pattern-or-practice disparate treatment claim, statistical proof almost always occupies center stage in a prima facie showing of a disparate impact claim. *See Hill v. Miss. State Employment Serv.*, 918 F.2d 1233, 1238 (5th Cir. 1990) (per curiam);

Rose v. Wells Fargo & Co., 902 F.2d 1417, 1424 (9th Cir. 1990). *See generally* 2 Larson, *supra*, §§ 22.01 to 22.10, at 22-1 to 22-78. The statistics must reveal that the "disparity is 'substantial' or 'significant.' " *Bouman v. Block*, 940 F.2d 1211, 1225 (9th Cir. 1991) (quoting *Clady v. County of L.A.*, 770 F.2d 1421, 1428 (9th Cir. 1985); *see EEOC v. Joint Apprenticeship Comm.*, 186 F.3d 110, 117 (2d Cir. 1999). Moreover, the statistics must be of a kind and degree sufficient to reveal a causal relationship between the challenged practice and the disparity. *See Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988); *Mems v. City of St. Paul*, 224 F.3d 735, 740 (8th Cir. 2000).

If the plaintiffs succeed in their prima facie showing, the burden of persuasion then shifts to the employer to demonstrate one of two things. The first option is to challenge the plaintiffs' statistical proof. This may be done by introducing evidence to show that either no statistically significant disparity in fact exists or the challenged practice did not cause the disparity. *See, e.g.*, *In re Employment Discrimination Litig.*, 198 F.3d 1305, 1313 (11th Cir. 1999). To successfully contest the plaintiffs' statistical evidence, however, the employer has to convince the factfinder that its "numerical picture is more accurate, valid, or reliable than the plaintiff[s'] evidence." 2 Larson, *supra*, § 23.02, at 23-3. If the employer is able to do so, it prevails and the case ends.

Assuming the employer is unable to successfully contest the plaintiffs' statistics, a second route is for the employer to demonstrate that the challenged practice or policy is "job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i). For example, "[i]n order to sustain a subjective [promotion] practice" that is having a disparate effect on minorities, the defendant-employer would have

to establish that "something about the [particular] position requires the selector to make a subjective evaluation of the applicant's abilities." *Mozee*, 940 F.2d at 1050; *see, e.g., Zahorik v. Cornell Univ.*, 729 F.2d 85, 96 (2d Cir. 1984).

If the employer fails to demonstrate a business justification for the policy or practice, *see* 42 U.S.C. §§ 2000e-2(k)(1)(A)(i), 2000e(m), then the plaintiffs prevail. If the employer succeeds in establishing a business justification, however, the disparate impact claim proceeds to a third stage. *See Joe's Stone Crab, Inc.*, 220 F.3d at 1275. At this third stage, the burden of persuasion shifts back to the plaintiffs to establish the availability of an alternative policy or practice that would also satisfy the asserted business necessity, but would do so without producing the disparate effect. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(ii), (C); *Joe's Stone Crab, Inc.*, 220 F.3d at 1275. *See generally* 2 Larson, *supra*, §§ 24.01 to 24.03, at 24-1 to 24-12.

Should the plaintiffs succeed in establishing a Title VII disparate impact violation, the court may order prospective class-wide injunctive relief. *See In re Employment Discrimination Litig.*, 198 F.3d at 1315. Still, in order for an employee to obtain individual relief (e.g., back or front pay), an inquiry similar to the remedial stage of a pattern-or-practice disparate treatment claim is generally required.[6] *See* 2 Larson, *supra*,

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[6] Both parties correctly note that some cases may require class-wide, rather than individualized, assessments of monetary relief. *See, e.g., Catlett v. Mo. Highway & Transp. Comm'n*, 828 F.2d 1260, 1267 (8th Cir. 1987) (holding that class-wide equitable monetary relief is permissible where "the number of qualified class members exceeds the number of openings lost to the class through discrimination and identification of the individuals entitled to relief would 'drag the court into a quagmire of hypothetical judgments' and result in 'mere guesswork' " (quoting *Segar*, 738 F.2d at 1289-90));

§ 31.02, at 31-4. Each class member must show that he or she was among those adversely affected by the challenged policy or practice. If this showing is made, the class member is entitled to individual relief unless the employer in turn can establish by a preponderance of the evidence that a legitimate non-discriminatory reason existed for the particular adverse action. *See, e.g.*, *Stephen v. PGA Sheraton Resort, Ltd.*, 873 F.2d 276, 279 (11th Cir. 1989).

II. STANDARD OF REVIEW

District courts are afforded substantial leeway in deciding issues of class certification. A class-certification decision will "only be overturned if it constitutes an abuse of discretion." *Lundquist v. Sec. Pac. Auto. Fin. Servs. Corp.*, 993 F.2d 11, 14 (2d Cir. 1993) (per curiam) (citation and internal quotation marks omitted). "However, the failure to follow the proper legal standards in certifying a class . . . is an abuse of discretion." *Blyden v. Mancusi*, 186 F.3d 252, 269 (2d Cir. 1999) (citation and internal quotation marks omitted) (alterations in original). And, our deference is "noticeably less" when a district court "has denied class status than when it has certified a class." *Caridad*, 191 F.3d at 291 (quoting *Lundquist*, 993 F.2d at 14).

Domingo v. New England Fish Co., 727 F.2d 1429, 1444 (9th Cir. 1984) (same); *Stewart v. Gen. Motors Corp.*, 542 F.2d 445, 452 (7th Cir. 1976) (holding that "the subjectivity of defendant's method of filling job vacancies renders impossible anything like a precise calculation of the pecuniary effects of discrimination"). However, as Metro-North argues, this is the exception, not the rule: Where possible, "there should be . . . a determination on an individual basis as to which class members are entitled to [recovery] and the amount of such recovery." *Shipes v. Trinity Indus.*, 987 F.2d 311, 318 (5th Cir. 1993); *see Domingo*, 727 F.2d at 1444.

Having now set forth the elements and evidentiary requirements for Title VII claims and our standard of review for the denial of class certification, we turn to the Class Plaintiffs' contentions on appeal.

III. CERTIFICATION OF THE PATTERN-OR-PRACTICE CLAIM

With respect to the district court's denial of class certification of the pattern-or-practice disparate treatment claim, the Class Plaintiffs argue that the court abused its discretion (1) by applying an erroneous standard to decide whether to certify the claim under Rule 23(b)(2) or, alternatively, (2) in failing to sever and certify under Rule 23(b)(2) at least the liability phase of the claim.[7]

A. Claim Certification

The Class Plaintiffs contend that the district court utilized an unduly stringent standard in refusing (b)(2) certification of the pattern-or-practice claim. We agree.

1. Standards for Assessing Predominance: A Bright-line or Ad Hoc Approach?

The (b)(2) class action is intended for cases where broad, class-wide injunctive or declaratory relief is nec-

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[7] *See generally* 1 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 4.14, at 4-51 to 4-52 (3d ed. 1992) (noting four alternatives utilized by courts in Rule 23(b)(2) class actions seeking injunctive relief coupled with individual damage claims: (1) limit certification to certain issues; (2) certify the claims for injunctive relief under Rule 23(b)(2) and the damages claims under Rule 23(b)(3); (3) certify the entire class under Rule 23(b)(2) and reconsider the certification category if the class is successful at the liability stage; and (4) certify certain issues and treat other issues as incidental ones to be determined separately after liability to the class has been resolved).

essary to redress a group-wide injury. The text of Rule 23(b)(2) is silent as to what extent—if at all—monetary relief may also be sought. The advisory committee's note to Rule 23 contemplates (b)(2) class certification of at least some claims for monetary recovery:

> This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate. . . . The subdivision does not extend to cases in which the appropriate final relief relates exclusively or *predominantly* to money damages.

Fed. R. Civ. P. 23(b)(2), advisory committee note (1966) (emphasis added).

To date, our circuit precedent has provided no guidance to lower courts faced with assessing whether "final relief relates . . . predominantly to money damages" to preclude (b)(2) class treatment. *See Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 564 (2d Cir. 1968) ("Subsection (b)(2) . . . is only applicable where the relief sought is exclusively or predominantly injunctive or declaratory."), *vacated on other grounds*, 417 U.S. 156 (1974). Without a clear standard discernible from either the text of Rule 23(b)(2) or our circuit precedent, the district court applied a standard recently set forth by the Fifth Circuit in *Allison*, 151 F.3d at 410. This standard, the incidental damages approach, provides that:[8]

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[8] This approach has been the subject of much discussion by other courts, practitioners and academic commentators. *See, e.g., Warnell v. Ford Motor Co.*, 189 F.R.D. 383, 388-89 (N.D. Ill. 1999); *Faulk v. Home Oil Co.*, 186 F.R.D. 660, 662-65 (M.D. Ala. 1999); Gary M. Kramer, *No Class: Post-1991 Barriers to Rule 23 Certification of*

> [I]n any such action in which both injunctive and monetary relief [are] sought, the inherently individualized nature of the determination of damages . . . render[s] it predominant, and thereby make[s] class action status under Rule 23(b)(2) inappropriate, except in those rare incidences in which the request for monetary relief [is] wholly "incidental" to the requested injunctive relief.

Robinson II, 197 F.R.D. at 87. The district court went on to state that incidental damages

> should at least be capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances. Liability for incidental damages should not require additional hearings to resolve the disparate merits of each individual's case; it should neither introduce new and substantial legal or factual issues, nor entail complex individualized determinations.

Id. at 88 (quoting *Allison*, 151 F.3d at 415).

By limiting (b)(2) certification to claims involving no more than incidental damages, the standard utilized by the district court forecloses (b)(2) class certification of all claims that include compensatory damages (or puni-

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Across-the-Board Employment Discrimination Cases, 15 Lab. Law. 415, 419-20, 455-69 (2000); Piar, *supra*, at 315-20; Harvey S. Bartlett, III, Comment, *Determining Whether a Title VII Plaintiff Class's "Aim Is True": The Legacy of* Allison v. Citgo Petroleum Corp. *for Employment Discrimination Class Certification Under Rule 23(B)(2)*, 74 Tul. L. Rev. 2163, 2175-88 (2000); Nikaa Baugh Jordan, Comment, Allison v. Citgo Petroleum*: The Death Knell for the Title VII Class Action?*, 51 Ala. L. Rev. 847, 867-75 (2000); Lesley Frieder Wolf, Note, *Evading Friendly Fire: Achieving Class Certification After the Civil Rights Act of 1991*, 100 Colum. L. Rev. 1847, 1858-61 (2000).

tive damages) even if the class-wide injunctive relief is the "form of relief in which the plaintiffs are primarily interested." *Hoffman v. Honda of Am. Mfg., Inc.*, 191 F.R.D. 530, 535-36 (S.D. Ohio 1999); *see Allison*, 151 F.3d at 429 (Dennis, *J.*, dissenting) (stating that "the majority decrees that if compensatory or punitive damages are prayed for, the case is automatically classified as 'predominantly' related to money damages and therefore not certifiable under (b)(2)"). This bright-line prohibition follows from the fact that "[t]he very nature of [compensatory] damages, compensating plaintiffs for emotional and other intangible injuries, necessarily implicates the subjective differences of each plaintiff's circumstances . . . ." *Allison*, 151 F.3d at 417; *see, e.g., Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1239 (11th Cir. 2000), *cert. denied*, 121 S. Ct. 1354 (2001). By definition, however, incidental damages must be susceptible to "computation by means of objective standards and not dependent in any significant way on the [class members'] intangible, subjective differences," which compensatory damages clearly are. *Robinson II*, 197 F.R.D. at 88 (quoting *Allison*, 151 F.3d at 415); *see Smith v. Texaco, Inc.*, No. 00-40337, 2001 WL 958903, at *6, ___ F.3d ___, ___ (5th Cir. Aug. 22, 2001) ("[C]onsidering *Allison* and rule 23(b)(2)'s formulation, the instant claims could not have been certified under that paragraph, because *compensatory and punitive damages predominate over injunctive/declaratory relief.*" (emphasis added)).

Thus, the question we must decide is whether this bright-line bar to (b)(2) class treatment of *all* claims for compensatory damages and other non-incidental damages (e.g., punitive damages) is appropriate. For the reasons we discuss below, we believe that it is not and therefore decline to adopt the incidental damages

approach set out by the Fifth Circuit in *Allison* and followed by the district court below. Rather, we hold that when presented with a motion for (b)(2) class certification of a claim seeking both injunctive relief and non-incidental monetary damages, a district court must "consider[ ] the evidence presented at a class certification hearing and the arguments of counsel," and then assess whether (b)(2) certification is appropriate in light of "the relative importance of the remedies sought, given all of the facts and circumstances of the case." *Hoffman*, 191 F.R.D. at 536. The district court may allow (b)(2) certification if it finds in its "informed, sound judicial discretion" that (1) "the positive weight or value [to the plaintiffs] of the injunctive or declaratory relief sought is predominant even though compensatory or punitive damages are also claimed," *Allison*, 151 F.3d at 430 (Dennis, *J.*, dissenting), and (2) class treatment would be efficient and manageable, thereby achieving an appreciable measure of judicial economy.

Although the assessment of whether injunctive or declaratory relief predominates will require an ad hoc balancing that will vary from case to case, before allowing (b)(2) certification a district court should, at a minimum, satisfy itself of the following: (1) even in the absence of a possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought; and (2) the injunctive or declaratory relief sought would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits. Insignificant or sham requests for injunctive relief should not provide cover for (b)(2) certification of claims that are brought essentially for monetary recovery. *See, e.g., In re Sch. Asbestos Litig.*, 789 F.2d 996, 1008 (3d Cir. 1986).

2. Considerations Supporting the Ad Hoc Approach

Several considerations inform our decision to adopt this ad hoc approach over the incidental damages standard with its absolute bar to claims seeking compensatory and punitive damages.

Foremost among these is the fact that Rule 23 has historically been understood to vest district courts with the authority to determine whether, in their informed discretion, based on the particulars of the case, "the certification prerequisites have been satisfied." *Allison*, 151 F.3d at 431 (Dennis, *J.*, dissenting). We see no basis for the imposition of a bright-line rule such as the incidental damages standard that would plainly "nullif[y] the district court's legislatively granted . . . discretion" in making certification determinations. *Id.* at 430 (Dennis, *J.*, dissenting); *see also* 1 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 4.14, at 4-49 (3d ed. 1992) ("No clear standards have been or could be developed . . . in this area so pregnant with judicial discretion."); *cf. Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 139 (2d Cir. 2001) (noting that "the district court is often in the best position to assess the propriety of the class").

Additionally, we find that an ad hoc approach satisfies the very concerns that have led other courts to adopt the incidental damages standard—specifically, (1) achieving judicial efficiency, and (2) ensuring due process for absent class members. *See Allison*, 151 F.3d at 414-15. With respect to the former concern, permitting district courts to assess issues of judicial economy and class manageability on a case-by-case basis is superior to the one-size-fits-all approach of the incidental damages standard. As for the latter concern, as we discuss below, options other than the adoption of the incidental dam-

ages approach exist to eradicate the due process risks posed by (b)(2) class certification of claims for damages. *Cf.*, *Robinson v. Sears, Roebuck & Co.*, 111 F. Supp. 2d 1101, 1126 (E.D. Ark. 2000).

Where class-wide injunctive or declaratory relief is sought in a (b)(2) class action for an alleged group harm, there is a presumption of cohesion and unity between absent class members and the class representatives such that adequate representation will generally safeguard absent class members' interests and thereby satisfy the strictures of due process. *See, e.g.*, *Johnson v. Gen. Motors Corp.*, 598 F.2d 432, 437 (5th Cir. 1979) ("When only [non-monetary] equitable relief is sought in a[ ] [class] action involving a cohesive plaintiff group such as a class of black employees at an assembly plant, the due process interests of absent members will usually be safeguarded by adequate representation alone."). This presumption of cohesion and unity continues where incidental damages are also sought because entitlement to such damages does not vary based on the subjective considerations of each class member's claim, but "flow[s] directly from a finding of liability on the . . . claims for class-wide injunctive and declaratory relief." *Allison*, 151 F.3d at 416.

In contrast, where non-incidental monetary relief such as compensatory damages are involved, due process may require the enhanced procedural protections of notice and opt out for absent class members. This is because entitlement to non-incidental damages may vary among class members depending on the circumstances and merits of each claim.[9] The presumption of class homo-

[9] *See generally* George Rutherglen, *Notice, Scope, and Preclusion in Title VII Class Actions*, 69 Va. L. Rev. 11, 26 (1983) (noting that some individual class members may have damage claims "stronger than [those] of most other class members, or worth more, or in other respects sufficiently distinctive" such that "[n]otice and

geneity and cohesion falters, and thus, adequate representation alone may prove insufficient to protect absent class members interests. *See, e.g.*, *Lemon v. Int'l Union of Operating Eng'rs*, 216 F.3d 577, 580 (7th Cir. 2000); *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 897 (7th Cir. 1999); *Johnson*, 598 F.2d at 438; *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999); *Thomas v. Albright*, 139 F.3d 227, 236 (D.C. Cir. 1998). Absent class members may therefore need notice that their claims are being pursued in the class action and the opportunity either to opt out and pursue their claims separately or to intervene, should they conclude such active participation would better protect their individual interests.

However, certification of a claim for non-incidental damages under Rule 23(b)(2) poses a due process risk because this provision does not expressly afford the procedural protections of notice and opt out. *Compare* Fed. R. Civ. P. 23(b)(2), *with* Fed. R. Civ. P. 23(b)(3); *see also* Fed. R. Civ. P. 23(c)(2), (3). The bright-line prohibition of (b)(2) class treatment for claims seeking non-incidental damages eliminates this risk. It ensures that claims presenting individual specific damage issues that might require heightened due process protections are not certified under (b)(2). But, any due process risk posed by (b)(2) class certification of a claim for non-incidental damages can be eliminated by the district court simply affording notice and opt out rights to absent class members for those portions of the proceedings where the

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the right to opt out" may be warranted); Steve Baughman, Note, *Class Actions in the Asbestos Context: Balancing the Due Process Considerations Implicated by the Right to Opt Out*, 70 Tex. L. Rev. 211, 222-25 (1991) (discussing "reasons why the right to assert individual claims may be very important to those opt-out plaintiffs who have disproportionately larger damage claims than most members of the class").

presumption of class cohesion falters—*i.e.*, the damages phase of the proceedings.[10] *See Johnson*, 598 F.2d at 438; *see also Kyriazi v. W. Elec. Co.*, 647 F.2d 388, 392-95 (3d Cir. 1981). "[A] district court acting under its Rule 23(d)(2) discretionary power[ ] may require that an opt-out right and notice thereof be given should it believe that such a right is desirable to protect the interests of the absent class members "[11] *Holmes v. Cont'l*

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[10] For example, it appears to us that, for those stages of this case where the interests of the class members are essentially identical (i.e., the liability phase of the pattern-or-practice suit and the class-wide phases of the disparate impact claim), the due process rights of absent class members are ensured by adequate class representation alone. *See Ortiz*, 527 U.S. at 846 (noting exception to "tradition that everyone should have his own day in court" where "a person, although not a party, has his interests adequately represented by someone with the same interests who is a party" (quotations omitted)); *Richards v. Jefferson County*, 517 U.S. 793, 800-01 (1996) (stating that " 'members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present' " (quoting *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940))); *Eubanks v. Billington*, 110 F.3d 87, 95 (D.C. Cir. 1997) ("That back pay is characterized as a form of 'equitable relief' in Title VII cases does not undercut the fact that variations in individual class members' monetary claims may lead to divergences of interest that make unitary representation of a class problematic in the damages phase." (internal citation omitted)); *cf. Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989) (same), *superseded by statute on other grounds*.

[11] What due process requires by way of notice in any particular case may vary. Generally, however, notice should: (1) describe succinctly and simply the substance of the action and the positions of the parties; (2) identify the opposing parties, class representatives, and counsel; (3) indicate the relief sought; (4) explain any special risks of being a class member, such as being bound by the judgment; (5) describe clearly the procedures and deadlines for opting out; and (6) note the right of any class member to appear in the action through counsel. *See* Federal Judicial Center, *Manual for Complex Litigation* § 30.211, at 225 (3d ed. 1995).

Can Co., 706 F.2d 1144, 1154-55 (11th Cir. 1983) (internal quotation marks omitted); *see* Fed. R. Civ. P. 23(d)(2), (5); *see, e.g.*, *Eubanks v. Billington*, 110 F.3d 87, 92-94 (D.C. Cir. 1997); *County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1422, 1425 (E.D.N.Y. 1989).

To recap, we hold that the district court erred in applying the incidental damages standard to deny the Class Plaintiffs' request for (b)(2) certification of the pattern-or-practice disparate treatment claim. On remand, the district court should reconsider the propriety of (b)(2) certification in light of the standard that we adopt in this opinion. However, because we recognize that, even under the discretionary standard we endorse, the district court may still conclude that (b)(2) certification of the entire pattern-or-practice disparate treatment claim is inappropriate, we turn to consider the Class Plaintiffs' alternate contention that the district court erred in denying partial certification of the claim.

B. Partial Certification

The Class Plaintiffs argue that the district court erred in refusing to bifurcate the pattern-or-practice claim and certify the liability stage of the claim for (b)(2) class treatment. *See* Fed. R. Civ. P. 23(c)(4). We agree.[12] *See,*

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[12] Because we hold that the liability phase of the pattern-or-practice claim is appropriate for (b)(2) class treatment, we are not required to respond to Class Plaintiffs' contention that the liability phase is also appropriate for (b)(3) class certification

When faced with the question in *Allison*, the Fifth Circuit rejected (b)(3) certification of the liability phase. The *Allison* court reached this conclusion after applying the (b)(3) predominance requirement to the pattern-or-practice claim "as a whole" and finding that the "individual-specific issues" predominated. *Allison*, 151 F.3d at 421; *see Smith*, 2001 WL 958903, at *7, ___ F.3d at ___. The court's strict application of the (b)(3) predominance inquiry to the entire pattern-

e.g., *Morgan v. United Parcel Serv. of Am., Inc.*, 143 F. Supp. 2d 1143, 1145 (E.D. Mo. 2000); *Vaszlavik v. Storage Tech. Corp.*, 175 F.R.D. 672, 679-80 (D. Colo. 1997); *Butler v. Home Depot, Inc.*, No. C-94-4335 SI, 1996 WL 421436, at *4 (N.D. Cal. Jan. 25, 1996); *Morgan v. United Parcel Serv. of Am., Inc.*, 169 F.R.D. 349, 358 (E.D. Mo. 1996); *cf. EEOC v. McDonnell Douglas Corp.*, 960 F. Supp. 203, 204-05 (E.D. Mo. 1996).

Rule 23(c)(4)(A) provides that "an action may be brought or maintained as a class action with respect to particular issues . . . ." Fed. R. Civ. P. 23(c)(4)(A). District courts should " 'take full advantage of th[is] provision' " to certify separate issues "in order . . . 'to reduce the range of disputed issues' in complex litigation" and achieve judicial efficiencies. *Cent.*

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or-practice claim was based on a footnote in *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996), that stated: "The proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial." *Id.* at 745 n.21.

Although we do not decide the question, we note that it would be an issue of first impression in this circuit and caution that an alternative understanding of the interaction of (b)(3) and (c)(4) to that set forth in *Castano* has been advanced elsewhere. *See, e.g.*, *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) ("Even if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues."); *In re Tetracycline Cases*, 107 F.R.D. 719, 727 (W.D. Mo. 1985) ("[T]he appropriate meaning of Rule 23(b)'s predominance requirement, as applied in the context of a partial class certification request under Rule 23(c)(4)(A), is simply that the issues covered by the request be such that their resolution (as a class matter) will materially advance a disposition of the litigation as a whole.").

Wesleyan Coll. v. W.R. Grace & Co., 6 F.3d 177, 185 (4th Cir. 1993) (quoting *In re A.H. Robins Co.*, 880 F.2d 709, 740 (4th Cir. 1989)); *accord Hilao v. Estate of Marcos*, 103 F.3d 767, 782-87 (9th Cir. 1996); *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 929 (9th Cir. 1982). *See generally* Edward F. Sherman, *Class Actions and Duplicative Litigation*, 62 Ind. L.J. 507, 516 (1987) (arguing that "[a] class action should not be found unmanageable without [first] exploring the procedural devices available for bringing it in line. These include subclassing and trial of subclass issues separately, bifurcating liability and damages, . . . [and] appointing a special master for difficult evidentiary matters" (footnotes omitted)).

Here, litigating the pattern-or-practice liability phase for the class as a whole would both reduce the range of issues in dispute and promote judicial economy. For example, if the class should succeed and, even assuming that the remedial stage is ultimately resolved on a non-class basis, the issues and evidence relevant to these individual adjudications would be substantially narrowed:

> By proving that the defendant engaged in a pattern or practice of discrimination, not only is the plaintiff class's eligibility for appropriate prospective relief established, a prima facie case with regard to the remedial phase of the suit, in which relief for individuals is considered, is also made out. Thus, the court presumes that the employer unlawfully discriminated against individual class members. In pattern or practice cases, however, the presumption shifts to the employer not only the burden of production, but also the burden of persuading the trier of fact that it is more likely than not that the

employer did not unlawfully discriminate against the individual.

Craik v. Minn. State Univ. Bd., 731 F.2d 465, 470 (8th Cir. 1984) (internal citation omitted). If, on the other hand, Metro-North succeeds at the liability stage, the question of whether it engaged in a pattern or practice of intentional discrimination that injured its African-American employees would be completely and finally determined, thereby eliminating entirely the need for a remedial stage inquiry on behalf of each class member.

In denying partial certification, the district court apparently did not appreciate these potential benefits because the court had misapprehended the nature of the proof required at the liability stage. Specifically, the district court believed that "discriminatory acts of particular department managers in particular individual situations" would have to be tried and that this would "overwhelm the liability phase." *Robinson II*, 197 F.R.D. at 88.

However, as we have discussed, *see supra* Part I(B)(1), the liability phase is largely preoccupied with class-wide statistical evidence directed at establishing an overall pattern or practice of intentional discrimination. *See Allison*, 151 F.3d at 434 (Dennis, *J.*, dissenting). To the extent that evidence regarding specific instances of alleged discrimination is relevant during the liability stage, it simply provides "texture" to the statistics. Such anecdotal evidence is not introduced to establish that the particular instances of discrimination actually occurred nor that the particular employees were in fact victims of discrimination. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-45 n.10 (1989), *superseded by statute on other grounds*. Indeed, to ensure that the liability phase remains manageable, the district court may limit the

anecdotal evidence as it deems appropriate. *See* Fed. R. Evid. 403.

Accordingly, we hold that the district court abused its discretion in not certifying the liability stage of the pattern-or-practice disparate treatment claim for (b)(2) class treatment.[13]

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[13] The Equal Employment Advisory Council, as *amicus curiae* on behalf of Metro-North, advances an additional argument against partial class certification which, though speculative at this stage, nonetheless warrants mention: that partial certification would risk violating the Re-examination Clause of the Seventh Amendment. The Re-examination Clause provides in relevant part that "no fact tried by a jury shall be otherwise reexamined in any Court of the United States." U.S. Const. amend. VII. *Amicus curiae* contends that given the number of members in the putatitve class, the district court is likely to try the remedial phase of each class member's claim before a separate jury from the one that considers the liability phase, and that, should this occur, overlapping factual issues would be presented to the liability-phase and remedial-phase juries in violation of the Re-examination Clause. We disagree.

Trying a bifurcated claim before separate juries does not run afoul of the Seventh Amendment, but a "given [factual] issue may not be tried by different, successive juries." *Blyden*, 186 F.3d at 268. As one commentator has observed, avoiding this

> calls for sound case management, not [outright] avoidance of the procedure. . . . First, the court needs to carefully define the roles of the two juries so that the first jury does not decide issues within the prerogative of the second jury. Second, the court must carefully craft the verdict form for the first jury so that the second jury knows what has been decided already. If the first jury makes sufficiently detailed findings, those findings are then akin to instructions for the second jury to follow.

Steven S. Gensler, *Bifurcation Unbound*, 75 Wash. L. Rev. 705, 736-37 (2000) (footnotes omitted); *see Simon v. Philip Morris Inc.*, 200 F.R.D. 21, 36 (E.D.N.Y. 2001) (noting that "different issues can be submitted to different juries as long as they are not presented in a way that causes juror confusion or uncertainty"); Patrick Woolley, *Mass Tort Litigation and the Seventh Amendment Reexamination Clause*, 83 Iowa L. Rev. 499 (1998). *See generally Crane v. Consol. Rail Corp.*,

IV. CERTIFICATION OF THE DISPARATE IMPACT CLAIM

The Class Plaintiffs contend that the district court abused its discretion in declining to certify the disparate impact claim for (b)(2) class treatment. Here again, we agree.

In considering the propriety of the district court's decision to deny (b)(2) certification, we are mindful that, prior to the enactment of the Civil Rights Act of 1991, Title VII discrimination claims seeking both injunctive and equitable monetary relief, like the disparate impact claim here, were routinely certified as (b)(2) classes. *See, e.g.*, *Eubanks*, 110 F.3d at 92; *Probe v. State Teachers' Ret. Sys.*, 780 F.2d 776, 780 (9th Cir. 1986); *Holmes*, 706 F.2d at 1152; *Alexander v. Aero Lodge No. 735*, 565 F.2d 1364, 1372 (6th Cir. 1977), *superseded by statute on other grounds*; *Sperry Rand Corp. v. Larson*, 554 F.2d 868, 875 (8th Cir. 1977); *Rich v. Martin Marietta Corp.*, 522 F.2d 333, 341-42 (10th Cir. 1975); *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 250-51 (3d Cir. 1975); *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 256-57 (5th Cir. 1974); 5 Newberg & Conte, *supra*, § 24.115, at 24-381 to 24-383 & n.930; *see also Allison*, 151 F.3d at 415 (observing that "back pay could be sought in a (b)(2) class action because, as an equitable remedy similar to other forms of affirmative injunctive relief permitted in (b)(2) class actions, it was an integral component of Title VII's 'make whole' remedial scheme").

Given that the 1991 Act did not alter the general remedial structure of disparate impact claims, we think it plain that (b)(2) certification of disparate impact claims

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731 F.2d 1042, 1049-50 (2d Cir. 1984) (Friendly, *J.*) (discussing the use of special interrogatories to insulate various elements of a cause of action).

seeking both injunctive and equitable monetary relief remains appropriate.

Metro-North argues that in the instant case we should depart from this general practice because (b)(2) class certification of the disparate impact claim would violate the Seventh Amendment's Trial-by-Jury Clause. We are unpersuaded.

The Trial-by-Jury Clause provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. Const. amend. VII. It requires that "when an issue is common to both legal and equitable claims in the same proceeding, [the legal claim] must be tried first to a jury."[14] Jack H. Friedenthal, Mary Kay Kane & Arthur R. Miller, *Civil Procedure* § 11.5, at 511 (3d ed. 1999); *see Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 472-73 (1962). This is because, once the right to a jury trial attaches to a claim, it extends to all factual issues necessary to resolving that claim. Where a legal and equitable claim in a suit share a common factual issue, trial of the equitable claim first to a judge would foreclose the later presentation of the common issue to a jury, and thereby violate the trial-by-jury guarantee. *See Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-11 (1959). Thus, when as here, a pattern-or-practice

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[14] As the Fifth Circuit noted in *Allison*,

> The existence of common factual *issues* is to be distinguished from the existence of overlapping *evidence*. For purposes of the Seventh Amendment, the question is whether factual issues overlap, thus requiring one trier-of-fact to decide a disputed issue that must be decided by a subsequent jury, not whether the two fact-finders will merely have to consider similar evidence in deciding distinct issues.

Id. at 423 n.21 (citing *Ala. v. Blue Bird Body Co.*, 573 F.2d 309, 318-19 (5th Cir. 1978)) (emphases in original).

claim seeking compensatory damages is pled with a disparate impact claim, the pattern-or-practice claim must be tried first to a jury if there are common factual issues necessary to the resolution of each claim.

We believe Class Plaintiffs' opportunity to proceed to a jury trial first on the liability phase of the pattern-or-practice claim avoids the possibility of an infringement of the trial-by-jury guarantee. Should the Class Plaintiffs prevail at the liability stage of the pattern-or-practice claim, the court can order class-wide injunctive relief and proceed to the remedial phase. Trial of the disparate impact claim could then be put off until the remedial phase is resolved, thus ensuring that any overlapping factual issues between the two claims will have first been tried to a jury in accordance with the Seventh Amendment. If, however, the Class Plaintiffs should prove unsuccessful at the liability stage with respect to the pattern-or-practice disparate treatment claim, the district court can proceed with a bench trial of the disparate impact claim, relying on answers to special interrogatories from the pattern-or-practice jury for any common factual issues.

V. ADEQUACY OF REPRESENTATION

As a final challenge to class certification, Metro-North argues that the Class Plaintiffs are unlikely to "fairly and adequately protect the interests of the class" as required by Rule 23(a)(4). *See* Fed. R. Civ. P. 23(a)(4).

Two factors generally inform whether class representatives satisfy the Rule 23(a)(4) requirement: "(1) absence of conflict and (2) assurance of vigorous prosecution." 1 Newberg & Conte, *supra*, § 3.22, at 3-126; *cf. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997) ("[A] class representative must be part of the class and possess the same interest and suffer the same

injury as the class members." (internal quotation marks omitted) (alterations in original). Metro-North does not contend that a conflict exists between the Class Plaintiffs and the putative class. Rather, it argues that the Class Plaintiffs may lack an incentive to vigorously pursue the individual relief phases of the claims.

Metro-North bases this contention on the fact that, as part of a settlement and stipulation with Metro-North, the Class Plaintiffs agreed only to "participate as named plaintiffs and/or class representatives . . . in support of the class claims and/or [to] receive any class-wide injunctive relief," "but not [to seek] individual relief of any kind," including monetary relief. *Robinson II*, 197 F.R.D. at 89-90. Metro-North argues that "[e]ven if some or all of the remaining [Class] Plaintiffs [are] suitable representatives for purposes of prosecuting the claims for liability, they plainly [are] unsuited to serve as representatives for class claims for monetary relief, since none of them [are] entitled to any additional monetary relief." The district court agreed with Metro-North, reasoning that "[t]he net effect [of the settlement and stipulation] is that the [Class Plaintiffs] . . . have little or no continued interest in pursuing damages on behalf of their fellow class members." *Id.* at 90.

We think it significant that Metro-North has not suggested, nor did the district court find, that the Class Plaintiffs are inadequate representatives to pursue class-wide injunctive relief. Indeed, the settlement stipulation makes clear that the Class Plaintiffs stand to benefit from any class-wide injunctive relief that may be ordered. The Class Plaintiffs, therefore, plainly have an interest in fairly and vigorously pursuing the liability stage of the pattern-or-practice claim and the class-wide aspects of the disparate impact claim because the successful prosecution of one of these portions is a prerequisite for the issuance of class-wide injunctive relief.

Metro-North's contention that the Class Plaintiffs may thereafter fail to "vigorously" pursue the individual relief stages is both speculative and premature, and, we believe, is an insufficient basis for rejecting class certification at this juncture. Rather, the preferable course is for the district court to revisit the question of the Class Plaintiffs' "fitness" to represent the class if and when the individual-relief stages of the claims occur. Then, if the district court deems it appropriate, it can direct that class members who are entitled to seek individual relief be named as additional class representatives. *See Heit v. Van Ochten*, 126 F. Supp. 2d 487, 494-95 (W.D. Mich. 2001); *In re Copley Pharm., Inc.*, 161 F.R.D. 456, 468 (D. Wyo. 1995); *see also* Fed. R. Civ. P. 23(d)(3), advisory committee note (1966) ("Subdivision 23(d)(3) reflects the possibility of conditioning the maintenance of a class action . . . on the strengthening of the representation . . . .").

VI. ADDITIONAL OBSERVATIONS

Some additional observations are warranted. First, the district court retains discretion to modify the certification structure on remand as warranted by the progression of the case. *See generally* Federal Judicial Center, *Manual for Complex Litigation* § 20.13, at 14-15 (3d ed. 1995). This includes the discretion to sub-class the claims by department or otherwise. *See Marisol A.*, 126 F.3d at 379 ("Rule 23 gives the district court flexibility to certify subclasses as the case progresses and as the nature of the proof to be developed at trial becomes clear."). Indeed, the Class Plaintiffs' attorney conceded at oral argument that this may prove necessary.

Second, we emphasize again that today's decision does not relate to the underlying merits of the class claims, as to which we express no opinion.[15]

CONCLUSION

We vacate the district court's judgment dismissing the Class Plaintiffs' suit. The district court is instructed to certify the disparate impact claim under Rule 23(b)(2). The district court is also instructed to reconsider the propriety of certifying the entire pattern-or-practice disparate treatment claim in light of the standard set out herein. If the court determines in its discretion that (b)(2) certification of the entire claim is still inappropriate, then the district court shall bifurcate the pattern-or-practice claim and certify the liability stage under Rule 23(b)(2).

Each side to bear its own costs for this appeal.

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[15] However, speaking only for myself and recognizing the intense pressures to settle that often follow a class certification decision, *see In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298-99 (7th Cir. 1995), I think it appropriate to observe that two federal judges have previously expressed skepticism about the underlying merits of the claims. *See, e.g.*, *Caridad*, 191 F.3d at 297 (Walker, *J.*, dissenting in part); *Robinson I*, 175 F.R.D. at 48-49.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 1998

Argued: April 5, 1999 Decided: July 29, 1999

Docket Nos. 98-7825, -7837, -7855, -7857

VERONICA CARIDAD, individually and on behalf of all others similarly situated, ET AL.,

Plaintiffs-Appellants,

—v.—

METRO-NORTH COMMUTER RAILROAD,

Defendant-Appellee.

Before:

NEWMAN, WALKER, and SACK,

Circuit Judges.

Appeal from the May 15, 1998, judgment, of the United States District Court for the Southern District of New York (Jed S. Rakoff, District Judge), denying class certification in Title VII suit alleging racial discrimination with regard to discipline and promotion, and dismissing Plaintiff Caridad's claim of sexual harassment.

Affirmed as to Caridad; reversed as to denial of class certification and remanded. Judge Walker dissents in part with a separate opinion, disagreeing with the class certification ruling.

JOHN R. QUINN, Bay Shore, N.Y. (Alan L. Fuchsberg, Andrew J. Carboy, Molly A. Hunter, Jacob D. Fuchsberg Law Firm, New York, N.Y.; Russell Adler, Law Student, St. John's University, on the brief), *for plaintiffs-appellants.*

MYRON D. RUMFELD, New York, N.Y. (Gregory D. Wong, Proskauer Rose, New York, N.Y., on the brief), *for defendant-appellee.*

JON O. NEWMAN, *Circuit Judge.*

This appeal primarily concerns the commonality and typicality requirements of Rule 23(a) of the Federal Rules of Civil Procedure. The specific issue is whether these requirements can be met in a Title VII action where the members of the proposed class challenge the subjective components of company-wide policies and procedures governing employee discipline and promotion. This issue arises on an appeal by several of the named plaintiffs in a proposed class action against Metro-North Commuter Railroad ("Metro-North") from the May 15, 1998, judgment of the District Court for the Southern District of New York (Jed S. Rakoff, District

Judge). The judgment incorporated a prior ruling denying the Class Plaintiffs' motion for certification of a proposed class consisting of current and former African-American employees of Metro-North, and dismissed all claims, subject to a stipulation preserving the rights of some of the Plaintiffs to appeal the class ruling. In addition, Veronica Caridad, one of the named Plaintiffs, appeals only from that part of the judgment dismissing her individual claim of sexual harassment.

We reverse the District Court's judgment to the extent that it denied class certification. The Plaintiffs are challenging the delegation to supervisors, pursuant to company-wide policies, of the authority to make subjective decisions regarding employee discipline and promotion; under these circumstances the requirements of Fed. R. Civ. P. 23(a) can be satisfied, and are satisfied in this case. We affirm the District Court's dismissal of Caridad's individual claim because Metro-North has satisfied the requirements recently articulated by the Supreme Court for an affirmative defense to Title VII liability.

Background

I. Class Plaintiffs and Their Claims

The Class Plaintiffs are the named plaintiffs in two related actions consolidated by the District Court.[1] The proposed class consists of all African-American employees of Metro-North for the period from 1985 through 1996—an estimated 1,300 persons.

The Class Plaintiffs allege that Metro-North's company-wide policies for employee discipline and promotion delegate to department supervisors substantial authority to make discretionary decisions about disci-

[1] Seven of the named plaintiffs have not appealed.

pline and promotion that is exercised in a racially discriminatory manner and has a disparate impact on African-American employees. Following extensive discovery, the plaintiffs moved for class certification pursuant to Rule 23. In support of their allegations of systematic disparate treatment and disparate impact, the Plaintiffs submitted a report prepared by Dr. Harriet Zellner, the testimony of a sociologist, the testimony of Metro-North's own officers, and anecdotal evidence. Dr. Zellner's report was based on various multiple regression analyses performed on data files provided by Metro-North. In opposition to the motion for class certification, Metro-North submitted the report of Dr. David Evans, which attacked the methodology and conclusions of Dr. Zellner.

(a) Disciplinary Policy and Procedure

Pursuant to some sixteen collective bargaining agreements, Metro-North's disciplinary system, the "Progressive Disciplinary System" or "PDS," applies to all of the approximately 5,000 union employees at Metro-North, wherever employed in the company. Metro-North's Labor Relations Department oversees the PDS. In addition, Metro-North trains the PDS hearing officers in day-long sessions coordinated by the Labor Relations Department, and the hearing officers receive an official Metro-North Hearing Officers' Manual.

Pursuant to the PDS, a supervisor or manager may bring "charges" against a union employee for misconduct, including violations of Metro-North's policies, procedures, and safety rules. Approximately 400 supervisors and managers have the authority to bring such charges. The charges are investigated by a hearing officer who is responsible for gathering evidence and presenting it at a hearing where the employee is represented

by his or her union. A transcript of the hearing is presented to the charging supervisor, who determines what, if any, discipline to impose. Union employees may appeal any sanction pursuant to the procedures set forth in the collective bargaining agreements and the Railway Labor Act, 45 U.S.C. §§ 152 *et seq.* An assistant director of the Labor Relations Department conducts an initial review of the appeal, and a three-member Special Board of Adjustment, chaired by a neutral arbitrator, conducts the final review.

In a 1994 memorandum, Metro-North's Affirmative Action Director, Stephen Mitchell, voiced concern about the high percentage of disciplinary cases involving people of color. Also in 1994, because African-American and female employees in one department had complained of discrimination by their supervisor, Mitchell proposed that Metro-North review the disciplinary activities in that department from 1992 to 1993 to determine "if protected class employees have been unfairly disciplined."

Nineteen of the twenty-seven named Plaintiffs allege that they were unfairly disciplined because of their race.

(b) Promotion Policy

Metro-North's declared policy for filling management positions is to promote from within its own ranks. Between 60 and 80 percent of management positions are filled in this manner. The declared promotion policy requires the posting of all open management positions. The Personnel Department oversees posting of positions, receives and reviews applications, and maintains job title guidelines and pay structure. Although the Personnel Department assembles a list of qualified applicants, the manager of the department with a vacancy makes the

final decision. The manager is directed to hire the most qualified candidate, but no other instructions are given.

Several of the named plaintiffs allege that these policies are not strictly adhered to; in particular, they allege that positions are not always posted and, even when they are, that it is well known who will receive the position before it is posted. Furthermore, some positions are filled through exceptions to the posting requirements, which the plaintiffs allege contribute to racial bias in promotions. In addition, approximately 200 union positions at Metro-North, which are viewed as positions that might facilitate promotion to a management position, are not governed by the formal promotion protocol. Hiring decisions in these positions—labeled "partially excepted positions" and "agreement supervisors"—are left entirely to the individual manager's discretion; the Personnel Department does not participate in the hiring process. The named Plaintiff Joseph Kimbro applied for and was denied promotion to the partially excepted position of chief crew dispatcher. He alleges that Metro-North promoted four White employees, whom Kimbro had trained and all with less experience than he had, to this position.

Historically, Metro-North has been predominantly male and White, and the company's employment statistics show that African-Americans are not well-represented in management positions or in those positions in the Metro-North workforce from which promotions to management are made. Internally produced reports that Metro-North submits to the Federal Transit Administration show underutilization of African-Americans in five of the eight job categories applicable to Metro-North. Most striking, African-Americans could be expected, based on census figures for the New York

metropolitan area, to fill 58.8 percent of the skilled-craft jobs but in fact filled only 15 percent of such jobs.

(c) The Experts' Reports

Based on the results of numerous multiple regression analyses, the Class Plaintiffs' expert, Dr. Zellner, concluded that the "effect of being black on number of disciplinary charges over the 1990-to-1994 period was positive and highly significant statistically." Similarly, she concluded that the effect of being Black on the likelihood of being promoted from 1985-to-1994 was negative to a degree that was highly significant statistically. Dr. Zellner's analyses were run on eleven computer files provided by Metro-North—one for each of the ten years from 1985 to 1994 (providing basic data such as job title, hire date, last promotion date, termination date, department, race, and sex) and one providing information on disciplinary proceedings. She describes how she attempted to isolate the effect of race on the likelihood of discipline:

> In order to estimate the net effect of being black on discipline over the 1990-to-1994 period, we first defined the dependent variable . . . as the number of disciplinary charges recorded for each employee as of the end of this period. Next we obtained measurements on five variables—age, years with the company prior to 1990, years with the company from 1990 onwards, department, and union vs. management status—that we expected would affect an employee's chances, regardless of race, of becoming involved in the disciplinary process. We then estimated the effect of being black on number of disciplinary charges, controlling for these variables.

In assessing the effect of race on promotion, Dr. Zellner controlled for years of tenure, department, and union status.

Based on her analysis, Dr. Zellner concluded that Blacks, on average, faced .7 disciplinary charges, which was 3½ times the amount for Whites, who faced, on average, .2 disciplinary charges. According to Zellner, the probability of this occurring by chance is less than one in 10,000. Accordingly, she concluded that the estimated effect of race on being disciplined is highly significant statistically. The results of her regression analyses with respect to promotion were similar; being Black reduced an employee's likelihood of promotion by approximately 33 percent.

In opposition to class certification, Metro-North submitted a critique of Dr. Zellner's report prepared by its expert, Dr. Evans. Dr. Evans noted that Metro-North has decentralized disciplinary and promotion processes and that, "[a]s a result of this decentralization, an organization-wide pattern and practice of discrimination is . . . implausible." Dr. Evans opined that Dr. Zellner's conclusions to the contrary resulted from "her failure to account for differences that arise by department and position as well as her failure to take into account any specifics of the situation at Metro-North."

Evans' primary criticism of Zellner's report is that her analysis was done on a company-wide basis and not on a position-by-position basis. He stated that her results are examples of the "fallacy of composition," *i.e.*, that she had created a statistical illusion of disparity by aggregating data across many different job titles. Based on his analysis of the data, Evans concluded that the experiences of the named Plaintiffs were, "at best, typical of only a fraction of the Metro-North workforce." In particular, he pointed out that of 37 particular depart-

ments at Metro-North, no disciplinary action was taken in 25 of them during the relevant period. He also reported that in departments where disciplinary action had been taken, there was considerable variation from job to job. Significantly, Evans did not perform any regression analyses in reaching his conclusions; instead, he simply tallied numbers of disciplinary actions and made some basic comparisons.

Furthermore, Evans concluded that for two infractions that can be objectively documented—substance abuse and failure to remit—the higher rates of discipline of Blacks corresponded to the higher incidence of infractions by Blacks. Evans dismissed Zellner's findings on discipline, stating that her method "cannot show discrimination because blacks could, on average, work for supervisors who mete out more discipline to workers of all races, work in departments where all workers are more severely disciplined, or have committed more violations than whites."

With respect to promotion, Evans again cited Zellner's failure to perform a position-by-position analysis; in addition, he criticized Zellner for including "non-promotable positions" in her data pool, which, he contended, created the statistical illusion that Blacks are less likely to be promoted than Whites. He noted that the overall rates of promotion are 12.7 percent for Whites and 8.1 percent for Blacks. However, when he excluded jobs for which the promotion rate was less than one percent, he found little difference in promotion rates by race (20.3 percent for Whites versus 19.4 percent for Blacks).

In response to Evans' critique, Zellner prepared a supplemental report. The report argued that Evans "defin[ed] away" the possibility of a system-wide pattern of discrimination by taking that term to require either a centralized policy of discrimination or concerted

action by all supervisors. Zellner also attacked what she characterized as arbitrary selection of data and Evans' failure to perform regression analyses on the data he considered. Furthermore, she prepared a department-by-department comparison of the number of job titles in which Blacks and Whites, respectively, had higher discipline rates. This analysis showed that Blacks had higher discipline rates in 48 positions, in which 4,266 people were employed. Whites, on the other hand, had higher rates of discipline in 21 positions, and only 543 employees were employed in those positions. Zellner also performed department-by-department regression analyses to estimate the effect of being Black on the number of disciplinary charges within each department. In all departments, the effect of being Black was positive; in only one of the ten departments was the effect not statistically significant.

(d) The District Court's Decision

In August 1997, the District Court denied the Class Plaintiffs' request for class certification. *See Robinson v. Metro- North Commuter Railroad Co.*, 175 F.R.D. 46 (S.D.N.Y. 1997). The Court found Dr. Zellner's report unpersuasive:

> [D]efendant has satisfied the Court that the plaintiffs' statistics, even taken most favorably to plaintiffs, cannot carry their burden here, because they fail to take account of the fact that different Metro-North positions have materially different individual rates of discipline and of promotion associated with them. Unless these differences are taken into account, plaintiffs' global statistics are meaningless. Conversely, when these differences are taken into account, no statistically significant racial dispari-

> ties, either for discipline or promotion, can be established with respect to the great majority of positions at Metro-North. Thus, plaintiffs' statistics are inadequate to carry their burden of establishing commonality as to the company-wide class here sought to be certified.

Id. at 48 (citations omitted). The Court further found that the infirmities in the statistics were not cured by the affidavits submitted because they related only to each affiant's individual claim of discrimination. *See id.* at 48-49.

In addition, the Court noted a "more fundamental problem" with the Plaintiffs' attempt to demonstrate commonality:

> [E]ven while seeking certification of a company-wide class, [plaintiffs] concede that defendant's standardized, company-wide policies and procedures relating to discipline and promotion are (and were at all relevant times) non-discriminatory. . . . Their claim is that discrimination enters the picture only because defendant does not strictly adhere to its own policies governing discipline and promotion, but, rather, delegates broad authority for decision-making in promotions and discipline to its management personnel. This alleged policy of overdelegation is of no moment, however, in the absence of any proof that it opens the door to generalized discrimination. Here, as mentioned, neither plaintiffs' statistics nor [their] sociological opinion meaningfully supports such an inference.

Id. at 49. For these reasons, the Court concluded that the Plaintiffs had failed to demonstrate commonality and typicality. The Class Plaintiffs moved for reargument;

the District Court denied the motion during oral argument on Metro-North's motion for summary judgment on the individual claims of the named Plaintiffs.[2]

II. Caridad

Veronica Caridad, an African-American woman, began working for Metro-North in September 1992; after completing her training, she worked as an electrician until April 1995, when she resigned. Caridad was the only female working her shift, which included 12 men.

Caridad alleges that from March through September of 1994, her male supervisor, Will Clarke, sexually harassed her. She alleges several episodes, which included unwanted sexual touchings. During her deposition, Caridad testified that after these incidents she found it difficult to do her job because she "didn't know when [Clarke] was going to do this," and "every day [she felt she] could be subject to" another attack. In addition, Caridad alleges that she was treated hostilely by her male co-workers: one allegedly told her that "nobody cares what happens to you" and that she had "walked into a lion's den." She also stated that her work was unfairly criticized because of her sex.

Despite Metro-North's sexual harassment policy and the availability of procedures for lodging complaints, Caridad failed to report this harassment, at least initially. However, at a disciplinary hearing concerning her absenteeism, Caridad broke down, became very emotional, and complained of being sexually harassed. Caridad eventually spoke to Stephen Mitchell, Metro-North's

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[2] The District Court dismissed all but five of the claims challenged by Metro-North. These claims were later settled and dismissed, subject to a stipulation preserving the right to appeal the denial of the class certification.

Director of Affirmative Action, but she did not tell him the specifics of the attacks. Indeed, Caridad testified that although she complained that she was treated poorly, she never mentioned Clarke's sexual harassment to Mitchell. She further testified that she did not want Metro-North to investigate her complaints because she did not think an investigation would improve matters. She stated that she did not trust Metro-North or its equal employment office.

By letter dated February 10, 1995, Mitchell advised Caridad that, in light of her expressed wishes, he would not take further action until April. Despite Caridad's continued refusal to provide details about her harassment, Metro-North offered to transfer her to another shift; in addition, she was offered a service attendant position. Caridad declined the transfer, stating that she did not feel it would solve the problem because the other work site was also predominantly male.

On April 27, Caridad resigned from Metro-North. By letter dated May 11, Mitchell informed Caridad that "[b]ased on your failure to contact me regarding the investigation/resolution of your internal discrimination complaint, I am administratively closing your complaint as of today."

Based on these facts, Metro-North moved for summary judgment, arguing that it could not be held liable for sexual harassment because Caridad had refused to cooperate in its efforts to investigate her complaint. On January 15, 1998, the District Court dismissed Caridad's sexual harassment claim. The Court stated:

> [A]lthough Veronica Caridad complained of inappropriate physical contact and comments by coworkers and supervisors, she refused to cooperate with the investigation commenced by Metro-North into her allegations. Accordingly, even if these inci-

dents could constitute harassment, the acts complained of cannot be imputed to Metro-North.

Discussion

I. Class Certification

"Provided that the district court has applied the proper legal standards in deciding whether to certify a class, its decision may only be overturned if it constitutes an abuse of discretion." *Lundquist v. Security Pacific Automotive Financial Services Corp.*, 993 F.2d 11, 14 (2d Cir. 1993) (citation and internal quotation marks omitted). However, we are "noticeably less deferential to the district court when that court has denied class status than when it has certified a class." *Id.* (citing *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993)).

The party seeking to certify a class bears the burden of demonstrating numerosity, commonality, typicality, and adequacy. *See* Fed. R. Civ. P. 23(a). Here, we are concerned with the commonality and typicality criteria. As courts have noted, these requirements "tend to merge" because "[b]oth serve as guideposts for determining whether . . . the named plaintiff's claim and the class claims are so inter-related that the interests of the class members will be fairly and adequately protected in their absence." *General Telephone Co. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). Before certifying a class, a district court must be persuaded, "after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Id.* at 161.

Nevertheless, a motion for class certification is not an occasion for examination of the merits of the case. *See Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 570-72 (2d Cir. 1982). As the Supreme Court has stated, "[N]othing

in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974).

In this case, the District Court denied the motion for class certification because it concluded that Metro-North's policy of delegating discretionary authority to supervisors to make certain employment decisions affecting discipline and promotion precluded a finding of commonality and typicality. The Class Plaintiffs, on the other hand, argue that it is this policy—the delegation to supervisors, pursuant to company-wide policies, of discretionary authority without sufficient oversight—that gives rise to common questions of fact warranting certification of the proposed class. The Class Plaintiffs contend that this policy (i) has resulted in a pattern and practice of racial discrimination and (ii) has a disparate impact on African-American employees at Metro-North.

Though proving that the grant of discretionary authority to supervisory employees either results in a pattern and practice of discrimination or affects one class of employees more harshly than others is likely to be extremely difficult, *cf. Woodbury v. New York City Transit Authority*, 832 F.2d 764, 771 (2d Cir. 1987) ("Where challenged employment practices are decentralized and uncoordinated . . . statistics, though relevant, may be less significant in demonstrating bias than where a single office makes all employment decisions.") (citation and internal quotation marks omitted), the fact that the Class Plaintiffs challenge the subjective components of company-wide employment practices does not bar a finding of commonality under either the disparate treatment or disparate impact model. In *Falcon*, the Supreme Court noted that, under certain circumstances, disparate

treatment cases challenging subjective decision-making processes could be certified as class actions. *See* 457 U.S. at 159 n.15 ("Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class . . . if the discrimination manifested itself . . . in the same general fashion, such as through entirely subjective decisionmaking processes."); *Shipes v. Trinity Industries*, 987 F.2d 311, 316 (5th Cir. 1993) (affirming class certification where supervisors had authority to make subjective personnel decisions and noting that "[a]llegations of similar discriminatory employment practices, such as the use of entirely subjective personnel processes that operate to discriminate, satisfy the commonality and typicality requirements"). And, it is beyond dispute that the disparate impact analysis may be applied to subjective, as well as objective, employment practices. *See Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990-91 (1988). We see no reason to limit this principle to individual claims of disparate impact. Other courts have reached the same conclusion. *See, e.g., Barefield v. Chevron U.S.A., Inc.*, 1987 WL 65054, at *3-*4 (N.D. Cal. Sept. 9, 1987) (commonality found where managers made subjective employment decisions but were "controlled by uniform, centralized management organization" that oversaw a uniform promotion system and evaluation process).

Of course, class certification would not be warranted absent some showing that the challenged practice is causally related to a pattern of disparate treatment or has a disparate impact on African-American employees at Metro-North. Where the decision-making process is difficult to review because of the role of subjective assessment, significant statistical disparities are relevant to determining whether the challenged employment prac-

tice has a class-wide impact. *See Barefield*, 1987 WL 65054, at *3 (citing cases); *cf. International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977) ("Statistics showing racial or ethnic imbalance are probative . . . because such imbalance is often a telltale sign of purposeful discrimination. . . . In many cases, the only available avenue of proof is the use of racial statistics . . . ."") (citations and internal quotation marks omitted). Regardless of their ultimate persuasiveness on the issue of liability, the statistical report and anecdotal evidence submitted by the Class Plaintiffs are sufficient to demonstrate common questions of fact regarding the discriminatory implementation and effects of Metro-North's company-wide policies regarding promotion and discipline.

The District Court relied on the report of Metro-North's statistical expert, Dr. Evans, to conclude that the Class Plaintiffs' statistics were inadequate because they failed to take into account the fact that various Metro-North positions have materially different rates of discipline and promotion. Though Metro-North's critique of the Class Plaintiffs' evidence may prove fatal at the merits stage, the Class Plaintiffs need not demonstrate at this stage that they will prevail on the merits. Accordingly, this sort of "statistical dueling" is not relevant to the certification determination. *See, e.g., Krueger v. New York Telephone Company*, 163 F.R.D. 433, 440-41 (S.D.N.Y. 1995). We conclude that the Class Plaintiffs' statistical evidence supports a finding of commonality on the issue of discipline with respect to those African-American employees who were disciplined while working in one of the 48 positions in which African-Americans are more likely to be disciplined than Whites. In addition, the statistical evidence supports a finding of commonality on the promotion claim. The Class Plaintiffs submitted evi-

dence that tends to establish that being Black has a statistically significant effect on an employee's likelihood of being promoted; indeed, being Black reduces an employee's likelihood of promotion by approximately 33 percent. In conducting her analyses, the Class Plaintiffs' expert controlled for various factors that one would expect to be relevant to the likelihood of disciplinary action and promotion. These statistical disparities are not insignificant. *Cf. Watson*, 487 U.S. at 994-95. More detailed statistics might be required to sustain the Plaintiffs' burden of persuasion, *see Wards Cove Packing Company v. Atonio*, 490 U.S. 642, 650-55 (1989), but this report, in conjunction with the anecdotal evidence, satisfies the Class Plaintiffs' burden of demonstrating commonality for purposes of class certification.

The Class Plaintiffs also satisfied their burden of demonstrating typicality, which, as noted, tends to merge with the commonality requirement. This criterion does not require that the factual background of each named plaintiff's claim be identical to that of all class members; rather, it requires that the disputed issue of law or fact "occupy essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class." *Krueger*, 163 F.R.D. at 442 (citation and internal quotation marks omitted). Nineteen of the named Plaintiffs allege that they have been subjected to discipline pursuant to Metro-North's company-wide "PDS" as a result of racial discrimination. The fact that two of these Plaintiffs admitted that they had committed the infractions giving rise to the challenged disciplinary actions does not defeat a finding of typicality; indeed, one of the claims levied by the putative class is that African-American workers are disciplined for violations for which White workers are not. For these Plaintiffs, the question of whether Metro-North's system-wide PDS has

resulted in a pattern and practice of discrimination or affects African-Americans more severely than other employees is central to their claims. Likewise, for the seven named Plaintiffs who alleged that they were not promoted as the result of racial discrimination, the question of whether Metro-North's policy of delegating discretion to department supervisors to make subjective decisions regarding employee promotions is administered in a racially discriminatory manner or has a disparate impact on African-American workers is crucial to their claims, as well as to those of the proposed class.

In deciding a certification motion, district courts must not consider or resolve the merits of the claims of the purported class. *See Eisen*, 417 U.S. at 177. Here, the District Court credited Metro-North's expert evidence over that of the Class Plaintiffs. Such a weighing of the evidence is not appropriate at this stage in the litigation. Accordingly, we reverse the denial of class certification and remand the case for further proceedings. Those proceedings will include the District Court's consideration of whether the requirements of Rule 23(b) are met, a matter that the Court did not reach.

II. Caridad's Claim of Sexual Harassment

On appeal, Caridad makes two arguments in support of her claim that the District Court erred in dismissing her sexual harassment claim based on her failure to cooperate in Metro-North's attempted investigation of her complaint. First, she contends that Clarke's sexual harassment subjected her to a constructive discharge, and that such a discharge is a "tangible employment action" for which the employer is strictly liable without regard to an affirmative defense, under the Supreme Court's recent decisions concerning employer liability

for Title VII violations by supervisors, *see Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998). Alternatively, she argues that even if her constructive discharge is not a tangible employment action, Metro-North cannot satisfy the standard articulated by the Court in *Ellerth* and *Faragher* for an employer's affirmative defense to strict liability under Title VII.

In *Ellerth* the Supreme Court held that

> [a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Ellerth, 524 U.S. at __, 118 S. Ct. at 2270 (citation omitted); *see also Faragher*, 524 U.S. at __, 118 S. Ct. at 2292-93.

Contrary to Caridad's assertion, constructive discharge does not constitute a "tangible employment action," as that term is used in *Ellerth* and *Faragher*. In determining when an employer may be held strictly liable for the discriminatory acts of its supervisory employees, the Court

focused on the following language of the Restatement (Second) of Agency: "A master is not subject to liability for the torts of his servants acting outside the scope their employment, unless: . . . (d) the servant . . . was aided in accomplishing the tort by the existence of the agency relation." Restatement (Second) of Agency § 219(2) (1957). In searching for a principled limitation of the "aided by the agency relation" concept, the Supreme Court concluded that the requirement of a tangible employment action by the harassing supervisor would ensure that employer liability would be imposed without the possibility of an affirmative defense only where the employer is implicated in the harm visited upon the employee by his or her supervisor:

> When a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation. . . . As a general proposition, only a supervisor, or other person acting with the authority of the company, can cause this sort of injury. A co-worker can break a co-worker's arm as easily as a supervisor, and anyone who has regular contact with an employee can inflict psychological injuries by his or her offensive conduct. But one co-worker . . . cannot dock another's pay, nor can one co-worker demote another. . . . The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control.
>
> . . . . A tangible employment decision requires an official act of the enterprise, a company act. . . .

> For these reasons, a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer. . . .

Ellerth, 524 U.S. at __, 118 S. Ct. at 2269 (citation omitted); *see also Faragher*, 524 U.S. at __, 118 S. Ct. at 2290-92. Co-workers, as well as supervisors, can cause the constructive discharge of an employee. And, unlike demotion, discharge, or similar economic sanctions, an employee's constructive discharge is not ratified or approved by the employer.

Moreover, the facts of *Ellerth*, where the plaintiff, like Caridad, did not complain of the harassment prior to quitting her job, indicate that constructive discharge is not a tangible employment action depriving the employer of the availability of the affirmative defense to Title VII liability. Ellerth alleged that she had been constructively discharged as a result of sexual harassment by her supervisor, *see Ellerth*, 524 U.S. at __, 118 S. Ct. at 2263; in remanding the case for a determination of whether the employer could make out an affirmative defense, the Supreme Court noted that "Ellerth has not alleged she suffered a tangible employment action at the hands of [her supervisor]," *id.* at __, 118 S. Ct. at 2271.

Thus, although we have stated in another context that "[w]hen a constructive discharge is found, an employee's resignation is treated . . . as if the employer had actually discharged the employee," *Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1188 (2d Cir. 1987), constructive discharge is not a tangible employment action warranting the imposition of strict liability under the *Ellerth/Faragher* standard. Accordingly, we must determine whether Metro-North has demonstrated that it is entitled to the *Ellerth/Faragher* affirmative defense.

As noted above, in the absence of a tangible employment action, an employer can avoid liability for a supervisor's harassment of a subordinate if it demonstrates that (a) it exercised reasonable care in preventing and correcting any sexually harassing behavior and (b) the plaintiff-employee unreasonably failed to take advantage of any preventive or corrective opportunities. Caridad asserts that there is no evidence that Metro-North exercised reasonable care to prevent Clarke's behavior and that her failure to file a formal complaint and assist in the investigation of her claims was not unreasonable under the circumstances.

An employer need not prove success in preventing harassing behavior in order to demonstrate that it exercised reasonable care in preventing and correcting sexually harassing conduct. Although not necessarily dispositive, the existence of an anti-harassment policy with complaint procedures is an important consideration in determining whether the employer has satisfied the first prong of this defense. *See Faragher*, 524 U.S. at __, 118 S. Ct. at 2293 ("While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense."); *see also Fierro v. Saks Fifth Avenue*, 13 F. Supp.2d 481, 491 (S.D.N.Y. 1998) (noting that the existence of an anti-harassment policy with complaint procedure is "an important, if not dispositive, consideration"). It is not disputed that Metro-North had an anti-harassment policy with a procedure for filing complaints. Furthermore, the undisputed facts of Caridad's case indicate that Metro-North endeavors to investigate and remedy problems reported by its employees. Under

these circumstances, Metro-North exercised reasonable care to prevent and correct sexually harassing behavior.

With respect to the second prong of the affirmative defense, Caridad asserts that it was reasonable for her to be hesitant in speaking about the events. We do not doubt that there are many reasons why a victimized employee may be reluctant to report acts of workplace harassment, but for that reluctance to preclude the employer's affirmative defense, it must be based on apprehension of what the employer might do, not merely on concern about the reaction of co-workers. Caridad's reasons are not based on a credible fear that her complaint would not be taken seriously or that she would suffer some adverse employment action as a result of filing a complaint. Her reasons for not complaining to her employer are insufficient to preclude summary judgment in favor of Metro-North. *See Faragher*, 524 U.S. at ___, 118 S. Ct. at 2293 ("[W]hile proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense."). In creating the affirmative defense to vicarious liability for the acts of supervisors, the Supreme Court sought to "accommodate the principle of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees." *Faragher*, 524 U.S. at ___, 118 S. Ct. at 2292. Here, the facts reveal that Metro-North is entitled to an affirmative defense against Title VII liability for the alleged conduct of Caridad's supervisor.

Conclusion

We reverse the District Court's judgment to the extent that it denied certification of the proposed class and affirm to the extent that it dismissed Caridad's sexual harassment claim.

WALKER, *Circuit Judge, dissents in part*:

I join in that portion of the majority's opinion that affirms the dismissal of the claims of Veronica Caridad. However, with respect to the majority's view that the district court erred in denying class certification, I respectfully dissent.

Although it is true that our court's review should be somewhat more probing when a district court denies class certification than when it grants it, *see Lundquist v. Security Pac. Automotive Fin. Servs. Corp.*, 993 F.2d 11, 14 (2d Cir. 1993) (*per curiam*), our standard of review still remains one of abuse of discretion, *see id.*; *Johnpoll v. Thornburgh*, 898 F.2d 849, 852 (2d Cir. 1990) (*per curiam*). The district court acted well within its discretion when it denied class certification in this case. It is the duty of a district court faced with the question of class-action certification to scrutinize the available evidence, make factual findings where necessary and conduct "a 'rigorous analysis' to determine whether Rule 23(a) has been satisfied." *Sheehan v. Purolator, Inc.*, 839 F.2d 99, 103 (2d Cir. 1988) (quoting *General Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982)). The question that the district court had to decide in this case was whether plaintiffs had established common questions

of law or fact sufficient to meet the commonality and typicality requirements of Rule 23(a). I do not believe that they did. Simply alleging that the proposed class was all employees of Metro-North, and that they were members of an identifiable group of persons based on race, is, of course, insufficient to meet Rule 23(a)'s commonality and typicality requirements. Instead, discrimination plaintiffs must identify a common policy or practice, to which they were all subjected, that resulted in discrimination. This is what the Supreme Court meant when it said in *Falcon* that

> Title VII prohibits discriminatory employment *practices*, not an abstract policy of discrimination. The mere fact that an aggrieved private plaintiff is a member of an identifiable class of persons of the same race or national origin is insufficient to establish his standing to litigate on their behalf all possible claims of discrimination against a common employer.

Falcon, 457 U.S. at 159 n.15 (emphasis in original). As a matter of law, I cannot agree with the majority that Metro-North's practice of delegating personnel decisions—plaintiffs prefer to call it "overdelegation"—constitutes a policy or practice sufficient to satisfy the commonality requirement of Rule 23(a).

In my opinion, the district court should not have considered both parties' expert reports at the class certification stage. Although this evidence would be relevant to a determination of the merits of plaintiffs' discrimination claim, it was not relevant to a determination of the propriety of certifying a class. Plaintiffs have never argued that Metro-North, at the highest levels, has a hidden policy of discrimination that could

be smoked out by showing disparate impact throughout the company. Plaintiffs have conceded that Metro-North does not have a policy of discrimination. Indeed, it is undisputed that the company has written *anti-discrimination* policies applicable to all departments. Plaintiffs contend instead that certain department managers violate these policies by discriminating, and that it is Metro-North's policy of delegating to these managers the authority to promote and discipline that renders Metro-North liable for discrimination. Given this theory of the case, the disrict court should have deferred consideration of the expert reports until it was time to consider the merits of the discrimination claim. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974); *Schweizer v. Trans. Union Corp.*, 136 F.3d 233, 239 (2d Cir. 1998). Even though the district court's consideration of this evidence was premature, however, the district court's ultimate conclusion that there was no common question of law or fact to plaintiffs' claims sufficient to meet Rule 23(a)'s commonality and typicality requirements should be affirmed.

I do not know whether there might be one or more groups of employees within particular departments at Metro-North, who were subjected to common discriminatory practices or policies by specific department heads, that might properly be certified as classes under Rule 23(a); the issue is not before us. But, in the absence of some affirmative practice leading to discrimination by Metro-North—beyond the quite normal management practice of delegating personnel responsibility to departmental managers under the umbrella of an established anti-discrimination policy—I do not agree with the majority that the commonality and typicality require-

ments of Rule 23(a) are satisfied and that company-wide class certification is warranted, much less that the district court abused its discretion in denying it.

I respectfully dissent.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT NEW YORK

Nos. 94 CIV. 7374(JSR), 95 CIV. 8594(JSR).

CHARLES ROBINSON, et al.,

Plaintiffs,

—v.—

METRO-NORTH COMMUTER RAILROAD COMPANY,

Defendant.

RAYMOND NORRIS, et al.,

Plaintiffs,

—v.—

METRO-NORTH COMMUTER RAILROAD COMPANY,

Defendant.

MEMORANDUM ORDER

JED S. RAKOFF, U.S.D.J.

These consolidated cases, in which plaintiffs allege that defendant Metro-North Commuter Railroad Company ("Metro-North") has since its formation in 1983 systematically discriminated against its African-American employees in respect to promotion and discipline, are before the Court on remand from the Court of Appeals, see Caridad v. Metro-North Commuter Railroad, 191 F.3d 283 (2d Cir. 1999), and familiarity with the underlying allegations is presumed, see id.; see also Robinson v. Metro-North Commuter Railroad Co., 175 F.R.D. 46 (S.D.N.Y. 1997). In essence, plaintiffs allege that Metro-North, by "over-delegating" implementation of its facially nondiscriminatory promotion and discipline policies to the subjective discretion of departmental managers, permitted the managers to discriminate on account of race. Plaintiffs seek not only injunctive and equitable relief for the class as a whole but also compensatory damages for individual members of the class who were allegedly the victims of individual acts of intentional discrimination.[1]

Presently pending before the Court is plaintiffs' renewed motion to certify a class consisting of all past and present African-American employees of Metro-North, as well as plaintiffs' new but related motion to bifurcate the trial into liability and damages phases in order to allegedly obviate certain class-certification problems that might otherwise exist. By virtue of the guidance provided by the Court of Appeals in Caridad

[1] While plaintiffs also originally sought punitive damages, they now concede that they cannot obtain such damages against a public benefit corporation like Metro-North.

and the able briefing and arguments made by counsel for the parties on remand, the class action motion has been largely reduced to the question of whether the case is maintainable as a class action under either the second or third subsections of Rule 23(b), Fed. R. Civ. P.

Subsection 2 provides that an action that otherwise meets the requirements for class action status, see Rule 23(a), Fed. R. Civ. P., may be maintained as a class action if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). If all that plaintiffs were seeking here were injunctive relief barring Metro-North from delegating decisions affecting the discipline and promotion to department managers unless less subjective criteria were applied, Rule 23(b)(2) might readily be satisfied. But, as noted, plaintiffs also seek to compensate in damages individual members of the class for acts of allegedly intentional discrimination on the part of the department managers that plaintiffs maintain can be vicariously imputed to Metro-North.

On its face, the language of Rule 23(b)(2) does not directly address the question of whether, and under what circumstances, an action that seeks not only class-wide injunctive relief from a court (on grounds here of disparate impact) but also individualized awards of damages from a jury (on grounds here of intentionally disparate treatment) qualifies for class action status. The Court of Appeals, however, has concluded that "[s]ubsection (b)(2) was never intended to cover cases . . . where the primary claim is for damages, but is only applicable where the relief sought is exclusively or predominantly injunctive or declaratory." Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564 (2d Cir. 1968), vacated

on other grounds 417 U.S. 156 (1974); see Fed. R. Civ. P. 23(b)(2) Advisory Committee Note (1966). The key question, then, in applying Rule 23(b)(2) to a case like the instant one, is to determine which is "predominant": plaintiffs' request for damages or their request for injunctive relief.

The Second Circuit has offered relatively little guidance to making this determination, leaving the matter largely to the discretion of the district courts. In 1998, however, the Fifth Circuit directly addressed the issue in Allison v. Citgo Petroleum Corp., 151 F.3d 402, 410 (5th Cir. 1998), and concluded that in any such action in which both injunctive and monetary relief were sought, the inherently individualized nature of the determination of damages would render it predominant, and thereby make class action status under Rule 26(b)(2) inappropriate, except in those rare incidences in which the request for monetary relief were wholly "incidental" to the requested injunctive relief. See id. at 415.

> By incidental, we mean damages that flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief. Ideally, incidental damages should be only those to which class members automatically would be entitled once liability to the class (or subclass) as a whole is established. . . . Moreover, such damages should at least be capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances. Liability for incidental damages should not require additional hearings to resolve the disparate merits of each individuals's case; it should neither introduce new and substantial legal or factual issues, nor entail complex individualized determinations. Thus,

> incidental damages will, by definition, be more in the nature of a group remedy, consistent with the forms of relief intended for (b)(2) class actions.

Id. The standard enunciated in Allison thus neatly balances the efficiencies of a class-wide injunctive action against the due process requirements of individualized claims for damages, for "as claims for individually based money damages begin to predominate, the presumption of cohesiveness decreases while the need for enhanced procedural safeguards to protect the individual rights of class members increases." Id. at 413.

The Fifth Circuit standard has been endorsed by the Seventh Circuit, see Jefferson v. Ingersoll Int'l Inc., 195 F.3d 894, 898 (7th Cir. 1999), and arguably by the Sixth Circuit, see Butler v. Sterling, Inc., No. 98-3223, 2000 WL 353502 (6th Cir. 2000) (unpublished opinion), and appears not to have been disapproved by any circuit court. If applied to this case, such a standard would clearly require denial of class action status under Rule 23(b)(2), since determination of the damages suffered by individual members of the class would require individualized proof and proceedings to determine whether each such member suffered intentional discrimination on the part of his or her department manager, what injuries each such member thereby suffered, what individualized damages were appropriate to redress such injuries, etc. Even, however, if some less rigorous standard than that formulated by the Fifth Circuit were applied, by any reasonable standard, and on any reasonable view of this case, these multiple individual determinations of damages for the numerous members of the class here proposed would overwhelm classwide injunctive issues, from both the standpoint of the individual plaintiffs and the standpoint of the Court.

Tacitly conceding the force of these objections, plaintiffs, following remand of this case form the Second Circuit, moved to bifurcate the trial of liability from the trial of damages, arguing that at least the issue of Metro-North's liability could be determined on a class-wide basis. But "liability" here means not only liability for unintentional disparate impact but also liability for intentional disparate treatment; and since Metro-North's liability for intentional discrimination, if any, is a function of its vicarious liability for the allegedly discriminatory acts of particular department managers in particular individual situations,[2] these individual determinations will overwhelm the liability phase of any trial nearly as much as they would overwhelm any damages phase, once again rendering class action treatment inappropriate under Rule 23(b)(2).[3]

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[2] "Plaintiffs have never argued that Metro-North, at the highest levels, has a hidden policy of discrimination that could be smoked out by showing disparate impact throughout the company. Plaintiffs have conceded that Metro-North does not have a policy of discrimination. Indeed, it is undisputed that the company has written anti-discrimination policies applicable to all departments. Plaintiffs contend instead that certain department managers violate these policies by discrimination, and that it is Metro-North's policy of delegating to these managers the authority to promote and discipline that renders Metro-North liable for discrimination." Caridad at 297 (Walker, J., dissenting).

[3] At times, plaintiffs appear to suggest an even further bifurcation, in which the Court would first determine, as a class action, whether Metro-North's policy of "over-delegation" had led to a disparate impact on the promotion and discipline of African-American employees. This, of course, would be a very different case from the one alleged in the instant complaints, which are replete with allegations of intentional discrimination and demands for compensatory damages (claims which plaintiffs in no way propose to abandon). As to these latter claims, the effect of such ultra-bifurcation would be, not to save judicial resources, but to waste them, for the result of this

Turning to plaintiffs' alternative request for class certification under subsection 3 of Rule 23(b), that subsection allows courts to certify a class where "a court finds that questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). But it is obvious from what has already been discussed with respect to subsection 2 that in this case questions of fact affecting individual members of the class—such as whether a given individual member of the class was individually discriminated against by an individual department manager and thereby suffered individualizes injuries compensable by individual monetary damages—vastly predominate over any common questions of law or fact, at least so far as plaintiffs' claims of disparate treatment are concerned. For the same reason, the class action approach, far from being more efficient than individual actions, would be hopelessly complicated and prolonged (and made even more so if plaintiffs suggestions for bifurcation were adopted).

Moreover, these general objections to the applicability of Rule 23(b)(3) to this case are further buttressed by consideration of the particular factors specified in the second sentence of Rule 23(b)(3), viz., "(A) the interest of members in the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; [and] (D) the difficulties likely to be encountered in the man-

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first phase, whichever way it went, would not resolve any [illegible]ment of the remaining phases.

agement of the class action." As to the first factor, the highly individualized nature of the determination of disparate treatment and damages in this case makes the interest of individual class members in individually controlling the prosecution of their individual claim, rather than having it controlled by class representatives, a very strong one. Indeed, as discussed below, the presently-named plaintiffs have already settled their individual claims for damages, and therefore have little, if any, interest in zealously pursuing damages awards for other class members.

Second, and closely related, while most of the litigation in this case has thus far concerned the proposed certification itself, the fact that the named class representatives whose claims were not immediately dismissed on the merits went on to individually settle their claims for damages bears further implicit testament to the individualized nature of the overall litigation even as it has progressed to date.

Third, because plaintiffs and defendants are all likely to be located in the greater New York area, this is not a case where creating a class action will prevent multiple suits across the country. Consequently the fact that creating a class would lead to the claims here being litigated in the same forum is not a compelling reason to certify the class.

Finally, as already discussed, the "difficulties likely to be encountered in the management of a class action" in this case are very considerable and fraught with peril to the individual rights of plaintiffs and defendant alike.

Accordingly, the Court concludes that this case does not qualify for class certification, either in its entirety or as bifurcated, under either rule 23(b)(2) or Rule 23(b)(3).

There is, moreover, an independent objection to class certification that has arisen as a result of events that followed this Court's original denial of class certification on other grounds and that was therefore neither considered by this Court nor reviewed by the Court of Appeals. Specifically, after this Court rendered its prior decision denying class certification, defendant entered into settlements with all the named plaintiffs who now remain in this case (certain other plaintiffs having been dismissed on the merits). Pursuant to those settlements, these remaining plaintiffs entered into a Stipulation, dated January 13, 1998, and so ordered by the Court, that dismissed their claims with prejudice:

> except that the dismissal shall be without prejudice to the rights these plaintiffs otherwise would have: (i) to participate in the appeal of the Court's decision denying plaintiff's motion for class certification; (ii) to seek to participate as named plaintiffs and/or class representatives, offer evidence about their personal circumstances in support of the class claims and/or receive any class-wide injunctive relief (but not individual relief of any kind . . . in the event that . . . a class is certified in these actions); and (iii) to apply for reasonable attorneys' fees and costs.

Supp. Notice of Motion for Class Cert., Ex. A. The net effect is that the only remaining plaintiffs named in this case as class representatives have little or no continued interest in pursuing damages on behalf of their fellow class members. Accordingly, as a result of these new developments, class action status must independently be denied because the stated class representatives no longer

"fairly and adequately protect the interests of the class." See Rule 23(a)(4).[4]

For each and all of the foregoing reasons, plaintiffs' motions for class certification and bifurcation are hereby denied. In light of the above-quoted settlement stipulation, the effect is also to dismiss the case with prejudice. Clerk to enter judgment.

SO ORDERED.

/s/
Jed S. Rakoff, U.S.D.J.

Dated: New York, New York
September 27, 2000

[4] Apprised of this problem at oral argument of these motions, plaintiff's counsel suggested he might be able to find class representatives of continuing adequacy, see transcript of 1/19/00 at 9-12, but he thereafter failed to offer any.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT NEW YORK

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94 Civ. 7374 (JSR)
95 Civ. 8594 (JSR)

CHARLES ROBINSON, SHARON E. MACK, JAMES OLIVER, JOAN WOODBERRY, JAMES K. HUNT, DARRYLL F. SIMPSON, VERONICA CARIDAD, ELAINE ESTER, DONALD HINES, JAMES JACKSON, CYNTHIA KING, ANTHONY ELLIS, PRINCE TILLERY, HELEN PEREZ, LORD TAYLOR, DORETHEA RICHARDSON, EARL VAUGHN, TERESA WHYTE, DWAYNE SCOTT, and GLENROY LIBURD,

Plaintiffs,

—v.—

METRO-NORTH COMMUTER RAILROAD COMPANY,

Defendant,

RAYMOND NORRIS, MARVIN EDWARDS, ERIC JONES, DANIEL CANADA, and GIESELE MIGUEL,

Plaintiffs,

—v.—

METRO-NORTH COMMUTER RAILROAD COMPANY,

Defendant.

MEMORANDUM ORDER

JED S. RAKOFF, U.S.D.J.

Plaintiffs in these two cases sued defendant Metro-North Commuter Railroad for employment discrimination on the basis of race in violation of Title VII of the Civil Rights Act of 1964 and various laws of the State of New York, and moved for class certification pursuant to Federal Rule of Civil Procedure 23(b)(2) and consolidation of their actions pursuant to Federal Rule of Civil Procedure 42(a). Following reassignment of the case to this Court on March 1, 1997, the Court convened a conference on March 12, 1997, at which, on defendant's consent, the Court granted plaintiffs' motion to consolidate, see 3/12/97 Transcript at 31, and set a firm schedule to have the case trial-ready by September 1997. Subsequently, after consideration of the parties' written submissions and oral arguments, the Court telephonically advised the parties on April 2, 1997 that the motion for class certification would be denied. This memorandum will serve to confirm that latter ruling and briefly state the reasons therefor.

The 25 plaintiffs in these two actions are present or former Metro North employees, who have served in seven of Metro-North's 37 departments and have held 12 of Metro-North's 220 employee slottings. One of the plaintiffs is a Pacific Asian Islander, the rest African-Americans. Although most of the plaintiffs are union members, one holds a non-agreement position and three others work for an employment agency that assigned them to work on Metro-North's premises. The plaintiffs allege discrimination on varying bases, including individually varying incidents of racial discrimination, age discrimination, gender discrimination, disability discrimination, and religious discrimination. Additionally,

however, both Complaints allege as a general matter that Metro-North engages in company-wide discriminatory practices against African-American employees. On the basis of these company-wide allegations, plaintiffs seek to certify a class of "all African-American employees of defendant Metro-North Commuter Railroad from 1983 through 1996." This proposed class would include all such former or present African-American employees of Metro-North who are either union employees or lower- to middle-level management.

It is well established that the party seeking class certification bears the burden of showing that the requirements of numerosity, commonality, typicality and adequacy of representation set forth in Fed.R.Civ.P. 23(a) have been satisfied and that the putative class falls within one of the three categories set forth in Rule 23(b). Achem Products, Inc. v. Windsor, __ U.S. __, __, 117 S.Ct. 2231, 2245 (1997); Comer v. Cisneros, 37 F.3d 775, 796 (2d Cir. 1994). In this regard, the allegations set forth in the complaint are accepted as true, see Shelter Realty Corp. v. Allied Maintenance Corp., 574 F.2d 656, 661, n. 15 (2d Cir. 1978); In re NASDAQ Market-Makers Antitrust Litig., 169 F.R.D. 493, 501 (S.D.N.Y. 1996), but the Court is required to scrutinize the pleadings and other submissions to determine whether the prerequisites of Rule 23(a) have been met. See General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 161 (1982). Here, the Court, after a careful examination not only of the pleadings but also of the voluminous submissions provided by the parties following extensive class certification discovery,[1] concludes that

[1] Class certification discovery here included not only exchange of numerous documents, but also the depositions of 24 representative plaintiffs and 17 Metro-North officers and managers, and the exchange of expert reports and expert depositions.

the plaintiffs have failed to carry their burden with respect to both the commonality and the typicality requirements of Rule 23(a).[2] Accordingly, their motion for certification must be denied. Krueger v. New York Tel. Co., 163 F.R.D. 433, 438 (S.D.N.Y. 1995).

The commonality component of Rule 23(a) requires plaintiffs to show that there are questions of law or fact common to the aggrieved class. Comer, 37 F.3d at 796; Krueger, 163 F.R.D. at 439. Commonality does not require that all class members have identical claims and arguments. Trief v. Dun & Bradstreet Corp., 144 F.R.D. 193, 198 (S.D.N.Y. 1992). But plaintiffs must make a more than conclusory showing that the defendant discriminated against the class members in some general fashion, even if some of its employees also practiced individual discrimination. See Falcon, 457 U.S. at 159 n.15; Open Housing Ctr., Inc. v. Samson Management Corp., 152 F.R.D. 472, 476 (S.D.N.Y. 1993).

In the instant case, plaintiffs attempt to establish commonality chiefly by reference to statistical data and sociological opinion. As to the first, plaintiffs claim there are meaningful statistical disparities between the frequency with which Metro-North disciplines its African-American employees versus the frequency with which it disciplines other employees, and similarly with respect to frequency of promotions. See Report of Dr. Harriet Zellner, dated May 14, 1996, at 3-7. But defendant has satisfied the Court that the plaintiffs' statistics, even

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[2] Defendants do not challenge class certification on numerosity grounds. As for adequacy, because defendants challenge the adequacy of the class representatives on the same basis as it challenges their typicality, the adequacy component of Rule 23 will not be separately addressed. See Achem Products, 117 S.Ct. at 2251, n. 20 (noting that the "adequacy of representation requirement 'tends to merge' with the commonality and typicality criteria of Rule 23(a)").

taken most favorably to plaintiffs, cannot carry their burden here, because they fail to take account of the fact that different Metro-North positions have materially different individual rates of discipline and of promotion associated with them. See Affidavit of David Evans, Ex. 1 at 7-18 (Report of Dr. David Evans, dated April 15, 1996). Unless these differences are taken into account, plaintiffs' global statistics are meaningless. See Sheehan v. Purolator, Inc., 103 F.R.D. 641, 649 (E.D.N.Y. 1984), aff'd, 839 F.2d 99 (2d Cir.), cert. denied, 488 U.S. 891 (1988); see also Woodbury v. New York City Transit Authority, 832 F.2d 764, 771 (2d Cir. 1987); Stastny v. Southern Bell Tel. & Tel., Co., 628 F.2d 267, 278-79 (4th Cir. 1980). Conversely, when these differences are taken into account, no statistically significant racial disparities, either for discipline or promotion, can be established with respect to the great majority of the positions at Metro-North. See Affidavit of David Evans, Ex. 1 (Report of David Evans, dated April 15, 1996). Thus, plaintiffs' statistics are inadequate to carry their burden of establishing commonality as to the company-wide class here sought to be certified. See Wards Cove Packing Co., Inc. v. Atonia, 490 U.S. 642, 649-57 (1989); see also Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 994 (1988); Coser v. Moore, 739 F.2d 746, 750 (2d Cir. 1984).

As for the sociological opinion, even if one puts aside reservations one might have as to its ultimate admissibility under the standards of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), it consists on its face of little more than rank conclusion and gross speculation. For example, the opinion baldly premises that negative stereotypes result in African-American's being considered "inappropriate for higher level jobs" by defendant's managers. Affidavit of William T. Bielby,

¶ 12; Report of William T. Bielby, dated February 26, 1996 at ¶ 12. Similarly, the opinion simply presumes that Metro-North's personnel and disciplinary systems are inherently subjective and allow managers to materially circumvent policies that would reduce subjectivity and bias. Bielby Report ¶ 46. No meaningful weight can reasonably be attributed, ever at this state of the proceedings, to a report so facially suspect.

These infirmities in the statistics and the sociological opinion are in no way cured by the other affidavits, offered by plaintiffs in support of their motion. These six affidavits (from five plaintiffs and one other putative class member) relate on their face only to individual instances of alleged discrimination.[3] They hardly constitute a statistically significant number of aggrieved persons in a putative class of 1,300 employees. See Sheehan, 103 F.R.D. at 649; Ross v. Nikko Securities Co. Int'l Inc., 133 F.R.D. 99, 97-98 (S.D.N.Y. 1990).

Problems of proof aside, there is a more fundamental problem with plaintiffs' approach to commonality, in that, even while seeking certification of a company-wide class, they concede that defendant's standardized, company-wide policies and procedures relating to discipline and promotion are (and were at all relevant times) non-discriminatory. Indeed, plaintiffs state that "If those procedures were followed, it might open the door to equal opportunity." Plaintiffs' Moving Brief, at 15. Their claim is that discrimination enters the picture only because defendant does not strictly adhere to its own

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[3] Plaintiffs also submitted an unsworn, unsigned summary of the deposition testimony of another putative class member, Sharon Killiebrew. Defendants in turn submitted a statement from Ms. Killiebrew asserting that plaintiffs' summary was "taken out of context" and "slants, distorts and mischaracterizes my testimony." Rumeld Aff., Ex. 2.

policies governing discipline and promotion, but, rather, delegates broad authority for decision-making in promotions and discipline to its management personnel. This alleged policy of overdelegation is of no moment, however, in the absence of any proof that it opens the door to generalized discrimination. Here, as mentioned, neither plaintiffs' statistics nor its sociological opinion meaningfully supports such an inference. Indeed, as mentioned, the statistics, once analyzed in terms of individual positions, suggest only that, if there is any discrimination, it is localized to a few positions and individuals, insufficient to support a company-wide class. See Statsny, 628 F.2d at 279; see also Woodbury, 832 F.2d at 771; see also Bradford v. Sears, Roebuck and Co., 673 F.2d 792, 795-96 (5th Cir. 1982). And the sociological opinion simply assumes its conclusion, rather than meaningfully establishing it.

Accordingly, plaintiffs fail to establish commonality.

Plaintiffs have also failed to satisfy the typicality requirement of Rule 23(a)(3), i.e., the requirement that the claims or defenses of the representative parties be typical of the claims or defenses of the class as a whole. See Bishop v. New York City Dept. of Housing Preservation and Dev., 141 F.R.D. 229, 238 (S.D.N.Y. 1992). To the extent that plaintiffs allege that their claims are typical because they arise from alleged company-wide practices and course of conduct, this argument fails for the reasons set forth above. In addition, most of the named plaintiffs appear to center their individual allegations on claims that, on their face, depart markedly from the class allegations. For example, only five of the 25 plaintiffs assert a claim for discriminatory denial of promotion;[4] several plaintiffs admit that they have com-

[4] The plaintiffs who contend they have been denied promotions to positions are Veronica Caridad, Donald Hines, James Jackson,

mitted the infractions that gave rise to the challenged disciplinary incidents;[5] still others have been disciplined under plainly unique circumstances.[6] As previously mentioned, one of the plaintiffs is not even an African-American, and therefore, not at all a member of the class proposed by the notice of motion.[7] Moreover, the fact that not all named plaintiffs are union members may further preclude typicality. See Sheehan, 103 F.R.D. at 650-51; Lo Re v. Chase Manhattan Bank Corp., 431 F.Supp. 189, 197-98 (S.D.N.Y. 1977).

Accordingly, the typicality requirement is likewise not satisfied.

Based on the foregoing, plaintiffs' motion for class certification is denied.

SO ORDERED.

/s/
Jed S. Rakoff, U.S.D.J.

Dated: New York, New York
August 8, 1997

Cynthia King and Daryll Simpson. *See* Caridad Tr. 21-22; Hines Tr. 92-110; Jackson Tr. 110; King Tr. 114, 117; and Simpson Tr. 17-18.

[5] For example, Joan Woodberry admitted to hitting a co-worker and being involved in fights with other employees, Woodberry Tr. 97, 109, 113, 147-51, and Anthony Ellis admits that he slept on the job and was absent from his assigned location. Ellin Tr. 109, 111.

[6] For example, Charles Robinson contends that he was discriminated against in connection with his suspension for testing positive for drug use, Robinson Complaint, ¶¶ 37-72, and James Jackson's discipline arose from his alleged cover-up of safety violations. Jackson Tr. 89-90, 155-56.

[7] Geisele Miguel is a Pacific Asian Islander. Miguel Tr. 19-20.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Dkt. Nos. 98-7825(L), 98-7837(CON),
98-7855(CON), 98-7857(CON)

FILED OCT. 6, 1999

KAREN GREVE MILTON
ACTING CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 6th day of October one thousand nine hundred and ninety-nine.

NORRIS,

Plaintiff-Appellant,

—v.—

METRO-NORTH,

Defendant-Appellee.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant and the appellee.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

KAREN GREVE MILTON, Acting Clerk

By: /s/

Beth J. Meador,
Administrative Attorney

Federal Rule of Civil Procedure 23. Class Actions.

Rule 23. Class Actions.

(a) PREREQUISITES TO A CLASS ACTION. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive

relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) DETERMINATION BY ORDER WHETHER CLASS ACTION TO BE MAINTAINED; NOTICE; JUDGMENT; ACTIONS CONDUCTED PARTIALLY AS CLASS ACTIONS.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if

the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) ORDERS IN CONDUCT OF ACTIONS. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify

whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) **DISMISSAL OR COMPROMISE.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(f) **APPEALS.** A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 24, 1998, eff. Dec. 1, 1998.)

Supreme Court, U.S.
FILED
FEB 8 2002
CLERK

(2)

No. 01-908

In The

Supreme Court of the United States

METRO-NORTH COMMUTER RAILROAD COMPANY,

Petitioner,

v.

CHARLES ROBINSON, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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QUESTIONS PRESENTED

1. In determining whether plaintiffs in a Title VII pattern and practice action have established the existence of common questions of law or fact under Fed. R. Civ. P. 23(a), should the district court weigh evidence and make determinations of the merits or limit its analysis to whether plaintiffs have offered admissible evidence that establishes the existence of common questions of law or fact?

2. In a Title VII employment discrimination class action against a public entity, which does not include claims for punitive damages, may the district court certify the case under Fed. R. Civ. P. 23(b)(2)?

3. In a Title VII employment discrimination class action, may the district court bifurcate the action and certify only the pattern-or-practice liability issues under Rule 23(b)(2)?

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STATEMENT OF THE CASE

This class action alleges that Metro-North Commuter Railroad Company ("Metro-North" or "Petitioner") discriminates against its African-American employees with respect to promotions and discipline. The plaintiffs contend that Metro-North maintains company-wide policies and procedures that violate Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e), *et seq.* Specifically, plaintiffs allege that Metro-North's company-wide discipline and promotion policies delegate to department supervisors substantial discretion to make decisions and that this authority is exercised in a racially discriminatory manner and has a disparate impact on African-American employees. Plaintiffs seek injunctive relief, monetary damages for lost income, and compensatory damages. They do not seek punitive damages.

The discipline and promotion policies at issue in this case are complicated. There was substantial factual dispute below about the nature of these practices, their impact on African-American employees, and Metro-North's knowledge of the discriminatory effects. The Petition provides only Metro-North's factual contentions on these points.

Metro-North's Progressive Discipline System (PDS) applies to all of its approximately 5000 union employees (Pet. A-42 – A-43). The PDS uses uniform policies for the filing of disciplinary charges, the conduct of hearings and the assessment of punishments. The system is overseen by the centralized Labor Relations Department. It coordinates all-day training sessions of PDS hearing officers, who are provided with a uniform manual for the conduct

of hearings. *Id.* In 1994, Metro-North's own affirmative action officer expressed concern about the high percentage of disciplinary actions involving persons of color, and urged review of past disciplinary actions in one department where employees had complained of discriminatory discipline by their supervisor. *Id.* Plaintiffs provided expert testimony, further described below, which demonstrated statistically significant disparities in the rates of discipline for African-American employees, compared with white employees.

Metro-North has a company-wide policy that requires the posting of all open management positions (Pet. A-43 – A-44). The posting system, administered by the Personnel Department, is in fact often not followed or is merely a pretense because a candidate has already been pre-selected for the open position. Still other union positions – including some that are viewed as stepping-stones to management – are also exempted from the posting system. *Id.* The Metropolitan Transit Authority Inspector General prepared a 1993 report which documented Metro-North's failure to comply with its posting requirements and a pattern of "favoritism" and "willful" violation of company posting rules by a Metro-North senior executive. Even where positions are posted, hiring supervisors have unfettered discretion to select any candidate that they wish. The only company directive is to "hire the most qualified candidate." Statistical analyses demonstrated that there were statistically significant disparities in the promotion rates of African-American and white employees.

Metro-North's own vice-president testified that, historically, the railroad had been predominantly white and

male. The company's data demonstrates that African-Americans continue to be under-represented in management positions and in lower positions from which promotions to management are made. Only 21 of 324 employees in the EEO category for management and professionals are African-American.

Plaintiffs filed a motion for class certification, supported by anecdotal testimony from named plaintiffs and class members, deposition testimony from Metro-North officials, and expert statistical and sociological evidence. The district court concluded that plaintiffs failed to satisfy the Rule 23(a) requirements of commonality and typicality. The Second Circuit reversed because the lower court had weighed the expert evidence, crediting the defense expert over the plaintiffs' expert, which was inappropriate at the class certification stage. *Caridad v. Metro-North Commuter Railroad Co.*, 191 F.3d 283 (2d Cir. 1999) (hereinafter "*Caridad*").

The Petition omits any discussion of the Second Circuit's extensive analysis of the expert evidence that was submitted by both the plaintiffs and the defendant. The appellate court observed, *inter alia*,

- Plaintiffs' expert prepared numerous multiple regression analysis on Metro-North's computerized personnel data for a ten-year time period (Pet. A-45-48);
- These analyses looked at the effect of being black on the likelihood that one would be disciplined or promoted at Metro-North, and controlled for a number of variables; *Id.*
- These demonstrated that African-American employees of Metro-North are 3½ times

more likely than white employees to be disciplined and 1/3 less likely to be promoted to and within management. The probability of this occurring by chance was less than one in 10,000. *Id.*

- The results of these analyses were highly statistically significant for discipline as well as promotion; *Id.*
- The defense expert criticized the plaintiffs' expert for failing to conduct the analysis on a department-by-department basis; *Id.*
- The defense expert found that no disciplinary action had occurred in 25 of 37 departments; *Id.*
- The defense expert conducted no regression analysis himself but based his conclusions on "tallied numbers of disciplinary actions"; *Id.*
- The defense expert criticized the data included in the plaintiffs' promotion analysis; *Id.*
- In response to these criticisms, plaintiffs' expert prepared a supplemental report with additional analyses demonstrating that blacks had higher rates of discipline in 48 positions, representing the vast majority of employees; *Id.*
- The plaintiffs' supplemental report criticized the defense expert for failing to conduct regression analyses and selectively omitting data. *Id.*

The Second Circuit concluded that plaintiffs' statistical evidence, together with the anecdotal evidence presented, met the commonality and typicality requirements

of Rule 23(a). The Court limited the discipline class to those positions where African-Americans had higher rates of discipline, as demonstrated by plaintiffs' supplemental expert report (Pet. A-55). The Second Circuit remanded the motion to the district court for further consideration of the class certification motion. Metro-North's Petition for Certiorari from that decision was denied.

On remand, the district judge again denied class certification because he concluded that the plaintiffs could not satisfy the requirements of Rule 23(b)(2). The Second Circuit reversed. *Robinson v. Metro-North Commuter Railroad Co.*, 267 F.3d 147 (2d Cir. 2001) (hereinafter "*Robinson*"). The *Robinson* decision is discussed at length herein.

REASONS FOR DENYING THE WRIT

I. THE WRIT SHOULD BE DENIED BECAUSE THERE IS NO CIRCUIT CONFLICT REGARDING THE STANDARD FOR EVALUATING STATISTICAL EVIDENCE AT THE CLASS CERTIFICATION STAGE

A. This Court Has Already Denied Certiorari Once on the First Question Presented

Petitioner seeks a writ of certiorari on the Second Circuit's most recent decision concerning class certification, which addresses whether plaintiffs have satisfied Fed. R. Civ. P. 23(b) class action requirements. *Robinson*, 267 F.3d 147 (2d Cir. 2001). Petitioner previously sought a

writ of certiorari from this Court on the Second Circuit's earlier class certification decision, *Caridad v. Metro-North*, an opinion that addressed only Fed. R. Civ. P. 23(a) requirements. The first Question Presented to this Court in the earlier petition was whether plaintiffs' statistical evidence was sufficient to establish Rule 23(a) commonality, in light of criticisms raised by the defense expert.[1] This Court denied the earlier Petition for Certiorari. *Metro-North Commuter Railroad Co. v. Norris*, 529 U.S. 1107 (2000) (mem). Without acknowledging the prior Petition for Certiorari, Petitioner raises the same question again in this Petition.

The issue is no more worthy of review by this Court now than it was less than two years ago. There is no conflict in the circuits on this point. The standard for review of evidence at the class certification stage, set forth in *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982), is well understood by the lower courts and was applied appropriately by the Second Circuit in *Caridad*.[2]

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[1] The Question Presented on the earlier Petition for Certiorari was:

> Whether, for purposes of determining whether plaintiffs have satisfied the commonality requirement of Fed. R. Civ. P. 23(a), the District Court is precluded from evaluating the statistical evidence proffered by plaintiffs' statistics expert.

[2] While the current Petition repeats essentially the same question and arguments presented in the prior submission, the *Robinson* opinion, which is the subject of the current Petition, did not address the Rule 23(a) statistics argument that Petitioner raises. Petitioner cites no new legal or factual developments that would justify its repeated attempt to seek review of this issue.

B. The Second Circuit Properly Considered Statistical Evidence of Rule 23(a) Commonality

Petitioner claims that the Second Circuit ignored Metro-North's expert report and accepted the plaintiffs' report "without meaningful scrutiny" (Pet., p. 14). Petitioner has simply mischaracterized the opinion of the Second Circuit.

Far from relying solely on the allegations of the complaint, or blindly accepting plaintiffs' expert submissions, the Second Circuit's opinion contains a very detailed examination of the expert testimony offered by both the plaintiff and defense experts (Pet. A-45 – A-48). The appellate court's examination of the statistical evidence was far more detailed and comprehensive than the cursory summation provided by the district court (Pet. A-80 – A-81). The appellate court reviewed the results of plaintiffs' multiple regression analyses, which demonstrated statistically significant disparities for blacks with respect to both discipline and promotion. It then considered the defense expert's criticism that the plaintiffs' expert had failed to conduct the analyses on a department-by-department basis. It noted that, based on simple tallies rather than regression analyses, the defense expert found that no disciplinary action had occurred in 25 of 37 departments. The court then considered the supplemental report submitted by plaintiffs (which had been ignored by the district court) to answer criticisms raised by the defense expert. These additional analyses demonstrated that blacks had higher rates of discipline in 48 positions, representing the vast majority of employees. *Id.*

The appellate court concluded that the plaintiffs' expert reports supported a finding on commonality on the promotion claim as well as the discipline claim. Notably, however, the Second Circuit limited the discipline claim to those 48 positions in which blacks were more likely to be disciplined than whites, as noted in plaintiffs' supplemental report filed in response to the defense expert's contentions (Pet. A-55). This extensive analysis, and particularly the limitation on the scope of the discipline class, plainly demonstrates that the Second Circuit neither accepted the plaintiffs' expert without scrutiny nor disregarded the defense expert's testimony. It carefully evaluated both and properly concluded that this evidence, together with the non-statistical evidence submitted, met the commonality requirement of Rule 23(a).[3]

C. The *Falcon* Decision Requires a Rigorous Analysis of Rule 23 Requirements, Not an Adjudication of the Common Questions on Their Merits

The Second Circuit's analysis was completely consistent with the standard established by *Falcon*. At issue in *Falcon* was whether the named plaintiff in a Title VII class action, an employee who had been denied a promotion,

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[3] Recognizing the difference between plaintiffs' showing under Rule 23 and on the merits, the appeals court noted that "[m]ore detailed" statistics might be required to meet the plaintiffs' burden of persuasion on the merits (Pet. A-56). There is no question, however, that plaintiffs' statistical analyses are admissible and probative of class-wide discrimination. *See Bazemore v. Friday*, 478 U.S. 385, 400-401 (1986) (multiple regression analysis need not contain all possible variables to be admissible).

could properly represent a class of both applicants and employees under Rule 23(a). The district court had certified an "across the board" class, simply presuming that the named plaintiff's claim was typical of those of the applicant and employee class members and shared common issues of law and fact. This Court held that Rule 23(a) commonality and typicality cannot be presumed. "[A] Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, *that the prerequisites of Rule 23(a) have been satisfied.*" *Falcon*, 457 U.S. at 161 (emphasis added). Significantly, the Court held that the analysis could, in some cases, be based *on the pleadings alone*, while other cases might require the district court to go beyond the pleadings. "Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Falcon*, 457 U.S. at 160.

The *Falcon* decision stands only for the proposition that the district court may, when necessary, look beyond the pleadings to ensure that there is evidence to support the existence of questions of law or fact, common to the named plaintiff and to the class. Nothing in *Falcon* supports Petitioner's contention that the lower court must, or would be permitted to, adjudicate the merits of any of those "common questions" at the class certification stage.

The *Falcon* standard is consistent with the function and timing of class certification. Class certification is conducted "as soon as practicable" after the filing of the lawsuit to determine whether the preliminary indicia of a

class are present. Fed. R. Civ. P. 23(a). Under these time constraints and with only limited discovery, plaintiffs are not expected to prove the merits of their case at this early stage. Indeed, this Court has expressly prohibited an evaluation of the merits at the class certification stage. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) (nothing in Rule 23 "gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.")[4] Rather, the plaintiffs must only demonstrate that the Rule 23 prerequisites are satisfied.

A simple example illustrates the point. At class certification, the plaintiffs offer the declaration of a former human resources manager who states that the defendant-employer had a company-wide practice of hiring males to fill openings in sales positions. The employer proffers the declaration of a company executive who claims that no such policy exists. Assuming that the plaintiffs' witness was competent and the testimony had proper foundation, the district court assessing class certification could not adjudicate the merits of whether such a policy existed, deciding which witness to believe. The district court would only determine if there is a question about the existence of a company-wide policy that is common to the named plaintiff and the class members.

There is no different standard for assessing evidence of common statistical questions, as opposed to non-statistical questions, at the class certification stage in a Title VII

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[4] Any factual findings at the class certification stage in a disparate treatment case could also run afoul of either party's right to a jury trial. 42 U.S.C. § 1981a(c).

case. Just as the district court cannot weigh the evidence and resolve factual disputes between competing witnesses on core liability questions, the court cannot choose the more persuasive expert analysis at the class certification stage. The issue for the district court is whether the plaintiff's expert testimony tends to show the existence of a common question. While the district court may consider contrary evidence from the defense, class certification is not the stage at which to resolve the disputes on the merits.[5]

D. There is No Conflict in the Circuits About the Application of *Falcon* to Evidence Submitted in Support of Class Certification

As the foregoing plainly demonstrates, the Second Circuit properly applied *Falcon*. It scrutinized the statistical evidence in *Caridad*, without engaging in a premature and preemptive weighing of the evidence. In this regard, the Second Circuit is in line with all other circuit courts,

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[5] Petitioner also suggests that the court must engage in closer scrutiny of the statistical evidence at class certification because this case involves " 'overdelegation' " (Pet. pp. 18 – 19). This Court has long recognized that a company-wide practice of "entirely subjective decisionmaking" may be challenged under both the disparate treatment and disparate impact models. *Falcon*, 457 U.S. at 159 n.15; *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988). Many such cases are routinely brought under Title VII. *See, e.g., Stender v. Lucky Stores, Inc.*, 803 F.Supp. 259 (N.D. Cal. 1992); *Beckmann v. CBS, Inc.*, 192 F.R.D. 608, 614 (D. Minn. 2000). Nothing found in these cases nor in Rule 23 would suggest that district courts need to apply a different standard in such cases at class certification.

including the decisions cited by Petitioner.[6] None of those cases demonstrate a circuit conflict, much less a conflict on an "important matter" calling for "an exercise of this Court's supervisory power." Sup. Ct. R. 10(a).

For example, in *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 677-678 (7th Cir.), *cert. denied*, 122 S. Ct. 348 (2001), the Seventh Circuit reversed the lower court's class certification order in a putative breach of warranty class action because the district court wrongly assumed that "the substantive allegations in the complaint are accepted as true for purposes of the class motion." *Szabo*, 249 F.3d at 675. The district court relied solely on the pleadings and failed to look "beneath the surface of [the] complaint to conduct the inquiries identified in that rule and exercise the discretion [Rule 23] confers." *Id.* at 677. The Seventh Circuit's standard in *Szabo* – looking beyond the pleadings to assess the Rule 23 requirements – is completely consistent with the Second Circuit's approach in *Caridad*.

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[6] Petitioner contends that the Second Circuit's recent decision in *Visa Check/Master Money Antitrust Litigation v. Visa, U.S.A., Inc.*, No. CIV.A.00-7699-T, 2001 WL 1242717, at *5 (2d Cir. Oct. 17, 2001) is further evidence that it applies a different standard than the other circuits. Again, Petitioner is mistaken. Both the district court and the Second Circuit in *Visa Check* conducted thorough evaluations of the competing expert opinions. In affirming the district court's grant of class certification, the Second Circuit observed "[t]he question for the district court at the class certification stage is whether plaintiffs' expert evidence is sufficient to demonstrate common questions of fact warranting certification of the proposed class, not whether the evidence will ultimately be persuasive." *Visa Check*, 2001 WL 1242717, at *5.

The other cases cited by Petitioner apply the same uncontroversial proposition – the district court may have to look beyond the pleadings to ensure that Rule 23 requirements are satisfied, but not decide the issues on the merits. *Johnston v. HBO Management*, 265 F.3d 178, 188 (3rd Cir. 2001); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 166-168 (3rd Cir. 2001); *Castano v. American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996). Petitioner also relies on two decisions in which plaintiffs' statistical evidence was found not to satisfy Rule 23(a) requirements. The results in these cases are a reflection of the particular evidence and claims in those cases, not the application of a legal standard different than the *Caridad* court. *Chaffin v. Rheem Mfg. Co.*, 904 F.2d 1269 (8th Cir. 1990); *Stastny v. Southern Bell Telephone & Telegraph Co.*, 628 F.2d 267 (4th Cir. 1980).[7]

Finally, Petitioner urges this Court to grant certiorari because it contends that erroneous class certification orders may create undue pressure on a defendant to

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[7] In *Chaffin*, the plaintiff simply tallied the 72 promotions made during the relevant period and compared the two promotions received by blacks to the four or five promotions that might be expected if blacks had been promoted in proportion to their representation in the available pool of candidates. This meager showing, together with evidence that the lone plaintiff could not identify any other class member alleging discrimination, was found to be insufficient to establish typicality under Rule 23(a)(3). *Chaffin*, 904 F.2d at 1275-1276. In *Stastny*, the Fourth Circuit did not conclude that the class was improperly certified but, rather, found that the district court should have decertified the class once the record was sufficiently developed so that the evidence of a state-wide practice could be fully assessed. *Stastny*, 628 F.2d at 280-281.

settle rather than risk a trial on the merits (Pet., pp. 13, 21). This is not, however, an argument for Supreme Court review but one for intermediate appellate scrutiny. Rule 23 was amended in 1998 to add subsection (f), which permits interlocutory appellate review of class certification decisions. Among the factors that the appellate courts consider in permitting Rule 23(f) appeals is whether "the grant of class status raises the stakes of the litigation so substantially that the defendant likely will feel irresistible pressure to settle." *Prado-Steiman v. Bush*, 221 F.3d 1266, 1272 (11th Cir. 2000); *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 834 (7th Cir. 1999). It is the function of the appellate courts to exercise their discretion to ensure that class actions do not proceed to trial based upon erroneous class certification decisions.[8] Petitioner has failed to demonstrate that this concern justifies the extraordinary remedy of a grant of certiorari.

II. REVIEW OF THE RULE 23(b)(2) CERTIFICATION ISSUE WOULD BE PREMATURE SINCE NEITHER THE OUTCOME IN THIS CASE NOR THE EXTENT OF ANY CIRCUIT CONFLICT IS YET CLEAR

A. The Petition Should Be Denied Because Review of the Rule 23(b)(2) Certification Issue Would Be Premature

This Court should not take up this case on the issue of whether a Title VII class action, which includes money

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[8] Even if it were relevant, however, Petitioner has made no showing that the Second Circuit's *Robinson* decision will inappropriately coerce a settlement in this case.

damage claims, may be certified under Rule 23(b)(2). The Second Circuit remanded the class certification motion to the district court for certification of the disparate impact claim and for further consideration and certification of the disparate treatment claim based upon several alternatives. Until the district court has determined which method best fits the particular facts of this case, it is unclear what, if any, important legal and practical issues are implicated and review now would be premature.

The Second Circuit instructed the district court to:

> certify the disparate impact claim under Rule 23(b)(2) . . . [and] reconsider the propriety of certifying the entire pattern-or-practice disparate treatment claim in light of the standard set out herein. If the court determines in its discretion that (b)(2) certification of the entire claim is still inappropriate, then the district court shall bifurcate the pattern-or-practice claim and certify the liability stage under Rule 23(b)(2).

(Pet. A-38). It also suggested that departmental subclassing might be appropriate. *Id.* at A-37. Consistent with the Second Circuit's opinion, the district court may choose from at least four alternatives in making its class certification order.[9] It may certify the pattern and practice claim under Rule 23(b)(2); it may certify under Rule 23(b)(2) and order notice and opt-out rights under Rule 23(c)(2); it may order bifurcation and partial certification of the liability phase only; or it may require subclasses. Moreover,

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[9] There is no dispute that the disparate impact claim, which does not provide damage remedies or jury trial rights, may properly be certified under Rule 23(b)(2). Petitioner has not sought review of this part of the opinion.

as the Second Circuit recognized, class certification orders are provisional and "the district court retains discretion to modify the certification structure on remand as warranted by the progression of the case" (Pet. A-37).

Thus, the district court may select from a number of different approaches to class certification here. Each approach raises distinct legal issues, which may or may not be appropriate for review. Moreover, this Court would benefit from analyzing those issues in the context of the full record below, since many of the objections raised by Petitioner are practical issues about the management of Title VII class actions – concerns that may, in practice, never materialize. The Court retains authority to review the class certification decision at the conclusion of the litigation.

B. There Is Not a Sufficient Circuit Conflict to Warrant Supreme Court Review on the Issue of Whether Title VII Class Actions, Which Include Compensatory Damage Claims, May Be Certified Under Rule 23(b)(2)

There is not a sufficient circuit conflict to warrant immediate review of the standard for Rule 23(b)(2) certification in Title VII class actions, which include money damages. It has only been since the passage of the 1991 Civil Rights Act that Title VII plaintiffs could seek compensatory and punitive damage remedies for claims of intentional discrimination, as well as the right to a jury trial. Appellate courts are just beginning to address the implications of these changes for Title VII class actions. In wrestling with these issues, the lower courts have been

guided by this Court's observation that civil rights class actions are well-suited to certification under Rule 23(b)(2). *Amchem Products v. Windsor*, 521 U.S. 591, 614 (1997) ("Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of Rule 23(b)(2) cases).

To date, only three Circuits – the Fifth, Seventh and Second – have directly addressed the effect of damage claims on class certification in Title VII cases.[10] Nine circuits have *never* addressed the issue. The law in the Fifth Circuit – upon which Petitioner grounds its conflict

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[10] Petitioner cites two other circuit opinions, neither of which involved Title VII discrimination class actions, nor squarely addressed the issue presented here. *Butler v. Sterling*, No. CIV.A.98-3223-T, 2000 WL 353502, at *6-7 (6th Cir. 2000); *Murray v. Auslander*, 244 F.3d 807 (11th Cir. 2001). In *Butler*, an unpublished opinion, the Sixth Circuit affirmed the denial of Rule 23(b)(2) class certification for a Truth-in-Lending Act claim, which involved claims for statutory and actual damages. While the Sixth Circuit noted the "incidental damages" test from *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), the district court, in fact, applied the *Robinson* standard – whether, based on the facts of that case, injunctive relief was the primary relief sought. "The Court finds that the realities of the litigation demonstrate that the primary relief sought by plaintiff is monetary relief. . . . " *Butler*, 2000 WL 353502, at *7. The *Murray* case challenged the denial of services to allegedly disabled Medicaid-eligible plaintiffs under the Americans with Disabilities Act. Since plaintiffs had not established standing, the action was remanded. In dicta, the court cited *Allison* for the proposition that damage claims would predominate in this case since individual circumstances of each class member would have to be addressed. However, the Court remanded to allow for consideration of whether Rule 23(b)(3) standards could be met.

argument – continues to be very much in flux. Rather than review this issue prematurely, this Court should allow the appellate courts an ample opportunity to consider these issues in the context of fully-litigated cases.

The Fifth Circuit's decision in *Allison v. Citgo Petroleum* was the first post-1991 Act appellate decision to consider the implications for class certification of the inclusion of damage claims. The panel ultimately issued three different decisions in *Allison*, leaving its final holding very much in doubt.

The district court in *Allison* had denied class certification under Rule 23(b)(2), concluding that monetary damages – in that case, compensatory and punitive damages – were the predominant form of relief. *Celestine v. Citgo Petroleum Corp.*, 165 F.R.D. 463 (W.D. La. 1995). On May 15, 1998, the Fifth Circuit panel issued an opinion that affirmed 2-1 the district court's order. The plaintiffs sought en banc review, incorporating the reasoning of the dissenting judge's opinion. The Fifth Circuit then took the unusual step of withdrawing the May 15, 1998 opinion and replacing it with a new decision dated August 18, 1998. *Allison*, 151 F.3d 402 (5th Cir. 1998).

In the new opinion, the panel held that, in determining the propriety of Rule 23(b)(2) certification, the trial court must find that "monetary relief predominates in (b)(2) class actions unless it is *incidental* to requested injunctive or declaratory relief." *Id.* at 415 (emphasis added). It defined "incidental" to mean "damages that flow directly from liability to the class *as a whole* on the

claims forming the basis of the injunctive or declaratory relief." *Id.* (emphasis in original).[11]

The *Allison* story was not yet over. Following the issuance of the August 18 opinion, the plaintiffs filed a second suggestion for rehearing and en banc consideration. On October 2, 1998, the panel majority issued the following *per curiam* order, denying the request:

> Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. In denying rehearing, the panel majority makes the following observation: The trial court utilized consolidation under rule 42 rather than class certification under rule 23 to manage this case. We review that decision for abuse of discretion and we find no abuse in this case. We are not called upon to decide whether the district court would have abused its discretion if it had elected to bifurcate liability and issues that are common to the class and to certify for class determination those discreet liability issues.

Allison, 151 F.3d at 434. The order raised serious question about the precedential value of the August 18 opinion.

Arguably, the August 18 decision in *Allison* precludes certification under Rule 23(b)(2) of *any* Title VII case seeking compensatory and punitive damages. Indeed, Petitioner places the weight of its argument regarding circuit conflict on the differences in outcome between

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[11] *Allison* also included an extensive discussion of Rule 23(b)(3). Since the *Robinson* court did not address any claims under that subsection, there is no conflict presented among the circuits on (b)(3) standards.

Allison and *Robinson*. Yet, in a subsequent decision, *Smith v. Texaco, Inc.*, 263 F.3d 394 (5th Cir. 2001), the Fifth Circuit clarified that *Allison* did not create a per se bar to money damages in (b)(2) actions. "It is also plain that the presence of any amount of money damages does not result in a per se finding of predomination." *Id.* at 408. It further noted that "*Allison* recognized that providing rule 23(b)(2) class members with the procedural safe guards of notice and opt-out can permit civil rights class actions to proceed under the rule." *Id.* The language in *Smith* plainly suggested that the Fifth Circuit's "bright line" was not nearly so bright.

Further clouding the issue, the Fifth Circuit recently *withdrew* its opinion in *Smith*. *Smith v. Texaco, Inc.*, No. CIV.A.00-40337-T, 2002 WL 131415 (5th Cir. Feb. 1, 2002). At this point, the pronouncements of the Fifth Circuit are so confused that it is not clear what the conflict with the Second Circuit may be.

The Seventh Circuit's approach to the issue shares many similarities with the Second Circuit's decision in *Robinson*. In *Jefferson v. Ingersoll Intern, Inc.*, 195 F.3d 894 (7th Cir. 1999), the Seventh Circuit expressed concern about the inclusion of compensatory and punitive damage claims in a Rule 23(b)(2) class, if notice and opt-out rights were not provided. The Seventh Circuit remanded the case so that the district court could determine whether money damages were more than incidental to the equitable relief. Judge Easterbrook suggested various alternatives if Rule 23(b)(2) certification was inappropriate. The district court could certify under Rule 23(b)(3) for all purposes, certify under Rule 23(b)(2) and provide for notice and opportunity to opt out, or finally employ

"divided certification" – bifurcation with certification of equitable issues under 23(b)(2) and damage issues under 23(b)(3). While *Jefferson* suggests that (b)(2) cases should be limited to cases where damages are incidental, the Seventh Circuit's analysis leaves open the possibility of certification under both (b)(2) and (b)(3), even where compensatory and punitive damages are present. *Accord Lemon v. International Union of Operating Engineers*, 216 F.3d 577, 581-582 (7th Cir. 2000).

In *Robinson*, the Second Circuit adopted an "ad hoc" rule which allowed the district court to use (b)(2) certification if:

> it finds in its "informed, sound judicial discretion" that (1) "the positive weight or value [to the plaintiffs] of the injunctive or declaratory relief sought is predominant even though compensatory or punitive damages are also claimed," . . . and (2) class treatment would be efficient and manageable, thereby achieving an appreciable measure of judicial economy.

(Pet. A-23) (citation omitted). In assessing whether injunctive relief predominates in a particular case, the district court should satisfy itself that: "(1) even in the absence of a possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought; and (2) the injunctive or declaratory relief sought would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits" (Pet. A-23). Finally, the court cautioned that "[i]nsignificant or sham requests for injunctive relief should not provide cover" for cases that were, in fact, essentially for monetary relief. *Id.*

The Second Circuit reasoned that its approach was consistent with Rule 23, which has historically vested authority in the district courts to determine when the certification requirements have been met. The "ad hoc" rule also provided the most effective means for the court to ensure both judicial efficiency and the due process rights of absent class members. Like the Seventh Circuit, the *Robinson* court recognized that the district court could certify under 23(b)(2) and order notice and the right to opt-out pursuant to Rule 23(d)(2) to fully protect the class members' interest in money damage claims.

While the Second Circuit and the Fifth Circuit have adopted somewhat different standards on the limited issue of how to determine whether a case is predominantly for monetary damages, it is not clear that this difference in language will ultimately lead to a difference in results. Moreover, as discussed below, there is no disagreement among the circuits that bifurcation and partial certification is another alternative method to manage certification under 23(b)(2). Until other circuits have had an opportunity to consider this issue, the extent of the circuit conflict is not sufficient to warrant the Court's review. It is particularly important that the circuits have the benefit of complete trial records below so that the intensely practical problems raised by varying approaches to class certification can be fully explored.

Even if there were a sufficiently, well-developed conflict in the circuits, this would not be an appropriate vehicle to consider the issue. Because in this case the defendant is a public entity, there is no claim for punitive damages (Pet. A-68). Punitive damages were, however, an important component of the Fifth Circuit's decision in

Allison. *Allison* concluded that a claim for punitive damages precludes certification under Rule 23(b)(2) because such damages were not a group remedy and therefore did not meet its definition of "incidental damages." *Allison*, 151 F.3d at 417-418 (citations omitted). The analysis in *Jefferson* was also based on both compensatory and punitive damage claims. *Jefferson*, 195 F.3d at 896.

C. There Is No Circuit Conflict on the Issue of Partial Certification Under Rule 23(b)(2) of the Liability Issues Only

As noted above, the Second Circuit ordered the district court to reconsider certification of the pattern-and-practice claim under the standard discussed in its opinion. It directed that if the lower court determined that 23(b)(2) certification of the entire claim was still inappropriate, the district court should "bifurcate the pattern-or-practice claim and certify the liability stage under rule 23(b)(2)" (Pet. A-38).

This Court has long endorsed the use of bifurcation to manage Title VII class actions. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 360-362 (1977). The discrete issue of pattern-or-practice liability is tried first. In the event that the defendant prevails, the parties avoid the necessity of the remedial phase (Pet. A-30 – A-31). If the plaintiff prevails, the parties then turn to fashioning remedial proceedings that are consistent with the liability findings and due process requirements. Since the 1991 amendments, many district courts have used bifurcation as a means to manage Title VII cases that

include compensatory and punitive damage claims.[12] The Seventh Circuit has expressly endorsed the use of bifurcation as a means of managing Title VII class actions that include claims for compensatory and punitive damages. *Jefferson*, 195 F.3d at 898; *Lemon*, 216 F.3d at 581-582.[13]

Contrary to Petitioner's assertion (Pet., pp. 28-29), the *Allison* decision did not reject the use of bifurcation; it expressly did not reach it. The *per curiam* order, described above, observed: "We are not called upon to decide whether the district court would have abused its discretion if it had elected to bifurcate liability and issues that are common to the class and to certify for class determination those discreet liability issues." *Allison*, 151 F.3d at 434. *See Jefferson*, 195 F.3d at 898 (*Allison* rehearing order "suggest[s] the possibility of a partial or split class certification . . . "). There is, thus, no conflict among the

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[12] *See, e.g., Morgan v. United Parcel Service of America, Inc.*, 169 F.R.D. 349 (E.D. Mo. 1996); *Butler v. Home Depot, Inc.*, No. CIV.A.C-94-4335-SI, 1996 WL 421436 (N.D. Cal. Jan. 25, 1996); *Shores v. Publix Super Markets, Inc.*, No. CIV.A.95-1162-T-25(E), 1996 WL 407850 (M.D. Fla. March 12, 1996); *Adams v. Pinole Point Steel Co.*, No. CIV.A.C-92-1962-MHP, 1994 WL 515347 (N.D. Cal. May 18, 1994).

[13] In a footnote, Petitioner refers without explanation to a "serious question" as to whether multiple trials would violate the Seventh Amendment's Reexamination Clause (Pet. at 27, n.17). Both the Seventh Circuit in *Lemon* and the Second Circuit in *Robinson* have concluded that divided certification does not run afoul of the Seventh Amendment. *Lemon*, 216 F.3d at 582; Pet. A-32 n.13. While the *Allison* decision discusses potential concerns about the Seventh Amendment, those were in the context of its Rule 23(b)(3) analysis.

appellate courts about the propriety of partial (b)(2) certification in Title VII class actions.

III. THE PETITION SHOULD BE DENIED WITH RESPECT TO THE THIRD QUESTION PRESENTED

Petitioner lists a third Question Presented, but provides no explanation as to what the issue is or why it merits immediate review by writ of certiorari. Based on Respondents' reading of the Question, there is no basis for granting certiorari on this issue either.

Petitioner appears to challenge the determination in *Robinson* that the named plaintiffs, who have settled their individual damage claims, are nonetheless adequate class representatives. The issue arose because of the unique terms of a settlement stipulation, which resolved the plaintiffs' damage claims but allowed them to pursue the class certification appeal (Pet. A-35 – A-37). The Second Circuit concluded that the named plaintiffs retained an interest in class-wide injunctive relief and that it was premature to assume that they would not vigorously pursue it. The Second Circuit directed the district court to re-visit the issue at the appropriate time and, if necessary, require the appointment of additional named plaintiffs. This sensible and correct resolution by the Second Circuit, arising from the terms of an unusual, case-specific stipulation, presents no basis for certiorari.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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No. 01-908

IN THE

Supreme Court of the United States

METRO-NORTH COMMUTER RAILROAD COMPANY,

Petitioner,

v.

CHARLES ROBINSON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE UNITED STATES CHAMBER OF COMMERCE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to S. Ct. Rule 37.2, the Chamber of Commerce of the United States (the Chamber) moves for leave to file a brief *amicus curiae* in support of the Petition for a Writ of Certiorari to the Second Circuit. A copy of the proposed brief is attached. The Chamber is filing this Motion because Respondents have refused to consent to the filing of this brief. In further support of this Motion, the Chamber notes the following.

1. The Chamber is the world's largest federation of business companies and associations, with an underlying membership of nearly 3,000,000 businesses and professional organizations of every size, in every industry sector, and every region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of concern to American business.

2. One continuing concern of the American business community has been the proper interpretation and application of the employment discrimination laws in general, and the conduct of employment discrimination litigation in particular. The Chamber of Commerce, with the consent of the parties or the Court, has filed amicus curiae briefs in the Court in numerous recent employment discrimination cases, including *Toyota v. Williams*, 122 S. Ct. 681 (2002); *Circuit City Stores v. Adams*, 532 U.S. 105 (2001); *Reeves v. Sanderson Plumbing Products, Inc.*, 531 U.S. 133 (2000); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

3. The decision below creates and deepens significant and mature circuit splits of authority in an area of particular concern to the Chamber and its members; class action employment discrimination litigation. The Second Circuit, in contrast to decisions in other circuits, has ordered that class actions seeking money damages be certified under Fed. R. Civ. Pro. 23(b)(2) if the named class representatives aver that they are most interested in injunctive and declaratory relief, regardless of whether such relief in fact predominates over the money damages sought, and regardless of the difficulty of trying of a class action comprised of hundreds of individual claims for damages; has authorized the use of opt out notices in such cases, a course of action normally reserved for class actions certified under Rule 23(b)(3); and has precluded lower courts from conducting any meaningful analysis of evidence proferred by class representatives at the certification stage, claiming that such analysis is forbidden by the Court's decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

4. In combination, the rulings below render the class certification process little more than a formality. They also reflect the disarray in which the lower courts find themselves on the most fundamental questions posed by Rule 23 in class action employment litigation. These problems are exacerbated by the changes wrought by the Civil Rights Act of 1991, which at once made employment discrimination class actions more numerous, the applicable law more complex, and the application of the Court's prior decisions less clear.

5. The Chamber believes that the instant case, as well as *Thiessen v. GE Capital Corp.*, 255 F.3d 1221 (10th Cir. 2001), *pet. for cert. filed*, 70 USLW 3410 (2001), in which a writ of certiorari also is being sought with the Chamber's support, present exceptionally significant issues in this area with great

clarity. The Chamber submits that its views on these issues would be useful to the Court in determining whether to grant the Petition, and in deciding the issues posed in the event that review is granted.

Accordingly, the Chamber respectfully moves the Court to grant this Motion and allow the filing of the attached brief.

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INTEREST OF THE AMICI

The Chamber of Commerce of the United States (the Chamber) is identified in the preceding Motion for Leave to File.[1] Its interest in this matter is more completely expressed in the preceding Motion for Leave to File and in the Summary of Argument section below, and thus will not be restated at further length in this section.

SUMMARY OF ARGUMENT

1. Since 1991, when Congress authorized the recovery of compensatory and punitive damages and provided for jury trials under Title VII of the Civil Rights Act, the number of employment discrimination cases filed in the federal courts has nearly tripled,[2] an increase matched by the number of employment discrimination class actions filed annually in the federal courts.[3] There currently are 170 employment discrimination class actions pending in the federal courts, affecting the lives and livelihoods of tens of thousands of American workers and their employers.[4] Many other employment discrimination class actions are no longer pending because they recently have been resolved through widely

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1. Pursuant to Sup. Ct. Rule 37.6, the Chamber asserts that neither Petitioner nor Respondents assisted the Chamber or its counsel, in any way (even with expenses), in preparing or submitting this brief.

2. 8,413 civil rights employment cases were filed in the federal courts in 1990; in 1998 23,375 such cases were filed. *See* DOJ SPEC. REP., *Civil Rights Complaints in U.S. District Courts 1990-1998*, (January, 2000), at 1-2 (concluding that "[t]he growth of civil rights cases has been due largely to the increase in employment cases between private parties."). *See also Judicial Business of the United States Courts: 2000 Annual Report of the Director*, at Table C-2 (reporting that 21,928 employment cases were filed in 2000).

3. *See 1999 Federal Court Class Action Statistics*, Class Action Reports, Table 6, (employment class actions rose from a low of 30 filed in 1992 to 85 filed in 1998).

4. *See Judicial Business of the United States: 2000 Report of the Director*, at Table X-4.

reported multi-million dollar settlements, setting the stage for additional class action litigation.[5]

2. In decisions rendered twenty years ago, the Court provided careful and specific guidance for applying the requirements of Rule 23 to employment discrimination class litigation, making clear that the lower courts cannot certify a class action absent a "rigorous analysis" to ensure that appropriate procedural requirements have been met.[6] Despite the profusion of new class litigation, the Court has not opined upon how the expansion of relief, and the availability of jury trials, affects the use of the class action procedure in employment discrimination cases.

3. Without the Court's guidance, confusion has reigned as courts have struggled to harmonize the new rights created by the 1991 Act with the "principal purposes" of Rule 23: to promote "efficiency and economy of litigation. . . . ." *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 349 (1983). Despite significant questions about the use of a single class action to adjudicate myriad claims for compensatory and punitive damages, some courts have certified broad classes under both Rule 23(b)(2) and 23(b)(3), rendering orders which, as the Advisory Committee on the Federal Rules recently observed, can "force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability."[7]

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5. *See generally Court Approves $192.5 Million Settlement In Race Bias Class Action Against Coca-Cola*, Daily Labor Report (BNA) No. 127, at 1-5 (July 3, 2001); *Texaco Corp. Agrees To Spend $176 Million to Settle Race Bias Suit*, Daily Labor Report (BNA) No. 222, at D-4 (Nov. 18, 1996); *Judge Gives Final Approval to Settlement under which Publix will pay $81.5 million*, Daily Labor Report (BNA) No. 102, at D-26 (May 28, 1997).

6. *General Telephone Co. v. Falcon*, 457 U.S. 147, 161 (1982); *and see East Texas Motor Freight Systems, Inc. v. Rodriguez*, 431 U.S. 395 (1977).

7. Notes of Advisory Committee on 1998 Amendments. *See also* Gary M. Kramer, *No Class: Post-1991 Barriers to Rule 23*

(Cont'd)

4. The decision below represents the furthest extreme of this pro-certification approach. Rejecting settled law elsewhere, the Second Circuit held that a class action seeking compensatory damages must be certified under Rule 23(b)(2) if the district court concludes, on the basis of an "ad hoc balancing" test, that monetary relief is not foremost in the minds of the plaintiffs based upon, *inter alia*, the court's subjective judgment whether "even in the absence of a possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive and declaratory relief sought." Recognizing that certification of class claims for money damages under Rule 23(b)(2) "poses a due process risk because this provision does not expressly afford the procedural protections of notice and opt out", the court below held that notice and opt out rights are available and should be afforded under Rule 23(b)(2), ignoring the Court's observation to the contrary.[8] And, in line with decisions in several sister circuits, the court below held that in assessing whether the named plaintiffs have demonstrated sufficient commonality and typicality to satisfy the requirements of Rule 23(a), any meaningful analysis of the evidence proferred by the class constitutes an improper inquiry into the merits of the sort forbidden by the Court in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), guaranteeing that mere allegations made by class plaintiffs suffice to warrant certification.

5. This "certification-at-all-costs" approach to employment class litigation[9] cannot be reconciled with the Court's decision in *Falcon*. Moreover, as the court below acknowledged, its ruling

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(Cont'd)

Certification of Across-the-Board Employment Discrimination Cases, 15 Lab. Law. 415, 417 (Winter/Spring 2000).

8. *See generally Ticor Title Insurance Co. v. Brown*, 511 U.S. 117, 121 (1994) (dismissing writ of certiorari as improvidently granted).

9. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 422 (5th Cir. 1998).

is flatly at odds with well-established law in other circuits, which have refused to allow class certification under Rule 23(b)(2) unless the monetary relief is incidental to the injunctive relief sought and in which a more searching factual inquiry under Rule 23 is routinely allowed.[10] Ironically, to avoid application of this more restrictive line of decisions, named class plaintiffs frequently have jettisoned claims for compensatory or punitive damages and trial by jury[11], making significant strategic decisions that may bind and disadvantage absent class members.

6. Neither class members seeking relief nor employers facing enormous liability and huge legal fees for defense are served by such dramatic uncertainty in the law. Respectfully, the Chamber submits that guidance by the Court on the impact of expanded remedies and trial by jury upon employment discrimination class actions is desperately required. For reasons more fully developed below and elsewhere, the instant case and *Thiessen v. GE Capital Corp.*, 255 F.3d 1221 (10th Cir. 2001), *pet. for cert. filed*, 70 USLW 3410 (2001), in which a writ of certiorari also is being sought with the support of the Chamber,

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10. *See generally Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 422 (5th Cir. 1998); *and see Smith v. Texaco, Inc.* 263 F.3d 394 (5th Cir. 2001), *opinion withdrawn*, No. 00-40337, 2002 WL 131415 (5th Cir. Feb. 1, 2002); *Szabo v. Bridegport Machines, Inc.*, 249 F.3d 672, 677-78 (7th Cir.), *cert. denied*, 122 S. Ct. 348 (2001) ("The proposition that a district judge must accept all of the complaint's allegations when deciding whether to certify a class cannot be found in Rule 23 and has nothing to recommend it."); *Johnston v. HBO Film Management, Inc.*, 265 F.3d 178, 194 (3d. Cir. 2001).

11. *Federal Court Certifies Boeing Class; Female Employees Allege Job Disparities*, Daily Labor Report (BNA) No. 204, at A-2 (Oct. 24, 2001). *See* 2001 BNA Daily Labor Report No. 204 (Daily Ed. October 24, 2001) at A-2 (attorney for class of Boeing employees noting that the class had not requested compensatory damages to minimize certification problems); *Federal Judge Certifies Class Action In Black Worker's Suit Against Publix*, Daily Labor Report (BNA) No. 57, at A-3 (Mar. 25, 1999) (class counsel in suit against Publix commenting on decision to forego damages, withdraw jury demand and strike employer's jury demand).

are ideal vehicles for addressing these very significant issues and bringing necessary clarity to this field.

STATEMENT

1. Petitioner is a commuter railroad serving New York City and its northern suburbs. Respondents claim to represent a class of all African-American employees of Petitioner from 1983 to 1996, approximately 1,300 individuals. Pet. App. A-79.

2. Respondents do not challenge a centralized rule or policy of discrimination, and have conceded that Petitioner's standardized company policies and procedures are non-discriminatory. Pet. App. A-82. Rather, Respondents challenge Petitioner's alleged practice of "overdelegating" discretionary authority to make employment decisions related to discipline and promotions to department supervisors, which Respondents maintain has been used by individual managers to discriminate against African-American employees. Respondents have advanced both disparate treatment and disparate impact theories of recovery, and seek money damages on behalf of class members to redress, *inter alia*, "serious and permanent emotional distress due to degradation, denigration, harassment and humiliation."[12]

3(a). In two successive opinions, the district court found that this putative class action could not meet the requirements of Rule 23. In its initial ruling, the district court credited Petitioner's criticism of the statistical evidence presented by Respondents and found that "even taken most favorably to [Respondents]", their statistics did not establish a pattern of discriminatory decision-making because the statistics were global in nature and failed "to take account of the fact that different Metro-North positions have different individual rates of discipline and promotion associated with them." Pet. App. A-81. The court also found that the anecdotal evidence presented by several of the named plaintiffs, taken at face value, was statistically insufficient to satisfy the commonality and

12. Punitive damages are not available against Petitioner because it is a public entity. Pet. App. A-68.

typicality requirements for the very large class sought to be represented. Pet. App. A-82.

(b) A split panel of the Second Circuit found an abuse of discretion and reversed,[13] the majority holding that "in deciding a certification motion, district courts must not consider or resolve the merits of the claims of the purported class", Pet. App. A-57, and concluding that the district court improperly had relied upon Petitioner's criticism of the report of Respondents' statistical expert. The majority found that although Petitioner's statistical critique "might prove fatal at the merits stage . . . this sort of 'statistical dueling' is not relevant to the certification decision." Pet. App. A-55. Concluding that Respondents had submitted sufficient proof to establish compliance with Rule 23(a), the majority remanded so that the district court could consider the application of Rule 23(b) to the case.[14]

4(a). On remand, the district court held that even if Rule 23(a) requirements were met, certification was not appropriate under either Rule 23(b)(2) or (b)(3). Noting that Rule 23(b)(2) " 'was never intended to cover cases . . . where the primary claim is for damages, but is only applicable where the relief sought is exclusively or predominantly injunctive or declaratory'", Pet. App. A-69,[15] the District Court adopted the "incidental damages" approach enunciated by the Fifth Circuit in *Allison v. Citgo Petroleum Corp.*, and followed in other circuits.[16] The court thus found that certification of a class action

13. *Caridad v. Metro-North Commuter R.R.*, reported at 191 F.3d 283 (2d Cir. 1999), reprinted at Pet. App. A-39-66.

14. Judge Walker dissented, concluding that the alleged policy of delegating personnel decisions to first line supervisors did not constitute a policy or practice "sufficient to satisfy the commonality requirement of Rule 23(a)." Pet. App. A-64. Metro-North's petition for a writ of certiorari was denied. 529 U.S. 1107 (2000).

15. Quoting *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 564 (2d Cir. 1968), *vacated on other grounds*, 417 U.S. 156 (1974).

16. *Allison v. Citgo Petroleum, Inc.*, 151 F.3d 402 (5th Cir. 1998); *see also Lemon v. International Union of Operating Eng'rs Local 139*, (Cont'd)

seeking both monetary damages and injunctive relief was appropriate under Rule 23(b)(2) only where the "damages flow directly from liability to the class as a whole on the claims forming the basis of the injunctive and declaratory relief . . . [and are] capable of computation by means of objective standards and not dependent in any significant way upon the intangible subjective differences of each class member's circumstances." Pet. App. A-70 (quoting *Allison*). The court found that in this case,

> determination of the damages suffered by individual member of the class would require individualized proof and proceedings to determine whether each such member suffered intentional discrimination on the part of his or her department manager, what injuries each such member thereby suffered, what individualized damages were appropriate to redress such injuries, etc. . . . [B]y any reasonable standard, and on any reasonable view of this case, these multiple individual determinations for the numerous members of the class here proposed would overwhelm classwide injunctive issues. . . .

Pet. App. A-71. The court refused to certify under Rule 23(b)(3) because "questions of fact affecting individual members of the class . . . vastly predominate over any common questions of law or fact" and concluded that given the highly individualized, fact-specific determinations required to determine both liability to and damages for individual class members, "the class action approach, far from being more efficient than individual actions, would be hopelessly complicated and prolonged." Pet. App. A-73.

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216 F.3d 577 (7th Cir. 2000); *Rutstein v. Avis Rent-A-Car Systems, Inc.*, 211 F.3d 1228 (11th Cir. 2000), *cert. denied sub nom Zerei Agudath Israel Bookstore v. Avis Rent-A-Car System, Inc.*, 121 S. Ct. 1354 (2001); *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894 (7th Cir. 1999).

(b). Once again the Second Circuit found that the district court abused its discretion. Acknowledging but rejecting the "incidental damages" rule applied in other circuits, the court below held that district courts in the Second Circuit are required to conduct "an ad hoc balancing that will vary from case to case", Pet. App. A-23, which at a minimum requires a finding that "even in the absence of possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive and declaratory relief sought." *Id.* Noting the "due process risk" looming in any mandatory class action for money damages, the court of appeals advised the district court to "afford[] notice and opt out rights to absent class members for those portions of the proceedings where the presumption of class cohesion falters — *i.e.*, the damages phase of the litigation." Pet. App. A-27. The Second Circuit remanded the case to the district court to reconsider certification of the entire case under Rule 23(b)(2) as interpreted, but specifically ordered the lower court to "bifurcate the pattern-or-practice claim and certify the liability stage under Rule 23(b)(2)", Pet. App. A-38, in the event that it chose not to certify the entire case, rejecting Petitioner's argument that bifurcated trial of the liability determinations before successive juries was incompatible with the Seventh Amendment. Pet. App. A-32. A timely petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

I. The Court Should Clarify The Applicability Of Rule 23(b) To Employment Discrimination Class Actions Seeking Money Damages.

A. The Court Should Clarify The Standard for Certification Under Rule 23(b)(2).

A class action can be certified under Rule 23(b)(2) so long as "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." The Advisory Committee Notes to the Rule explain that Rule 23(b)(2)

incorporates an inherent proportionality inquiry: "The subdivision does not extend to cases in which the appropriate final relief relates *exclusively or predominantly* to money damages." *Id.* (emphasis added). The task posed by a given case, then, is to locate the remedial center of gravity; if trial of the case will revolve primarily around individualized claims for damages, certification under Rule 23(b)(2) is inappropriate.

Most courts of appeal have held that in employment discrimination class actions, this issue ought to be determined by application of an objective test based upon the relationship between the types of relief sought; "monetary relief predominates in (b)(2) class actions unless it is incidental to requested injunctive or declaratory relief." *Allison v. Citgo Petroleum Corp.*, 151 F.3d at 422-25.[17] Money damages are "incidental" if (1) they "flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief"; (2) they are damages to which a class member *automatically* would be entitled once classwide liability is established; and (3) they are capable of computation by objective standards and "not dependent in any significant way on the intangible, subjective differences of each class member's circumstances." *Id.* (emphasis added).[18]

This test has much to recommend it. It is consistent with the basic assumption underlying Rule 23(b)(2): the class has suffered an indivisible harm and seeks to vindicate a largely indivisible right. As Judge Easterbrook has explained,

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17. *See also Lemon v. International Union of Operating Eng'rs Local 139*, 216 F.3d 577 (7th Cir. 2000); *Rutstein v. Avis Rent-A-Car Systems, Inc.*, 211 F.3d 1228 (11th Cir. 2000), *cert. denied sub nom Zerei Agudath Israel Bookstore v. Avis Rent-A-Car System, Inc.*, 121 S. Ct. 1354 (2001); *Jefferson v. Ingersoll Int'l*, 195 F.3d 894 (7th Cir. 1999).

18. *Accord Rutstein*, 211 F.3d 1228 (11th Cir. 2000); *Lemon*, 216 F.3d 577 (7th Cir. 2000); *Miller v. Hygrade Food Products*, 198 F.R.D. 638, 641-42 (E.D. Pa. 2001); *Burrell v. Crown Cent. Petroleum, Inc.*, 197 F.R.D. 284, 289 (E.D. Tex. 2000); *Adams v. Henderson*, 197 F.R.D. 162, 171 (D. Md. 2000).

"Rule 23(b)(2) is designed for all-or-none cases in which 'final relief of an injunctive nature or a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate.'" *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 897-98 (7th Cir. 1999). "[C]ompensatory and punitive damages," conversely, "require individualized proof and determinations" and thus generally would not be "incidental" to equitable relief. *Allison*, 151 F.3d at 418.

The decision below, rejecting *sub silentio* a specific finding by the district court that "multiple individual determinations for the numerous members of the class here proposed would overwhelm classwide injunctive issues", Pet. App. A-73, takes the opposite approach by endorsing a wholly subjective test based upon the presumed desires of the class plaintiffs. The Second Circuit admittedly "decline[d] to adopt the incidental damages approach set out by the Fifth Circuit in *Allison* and followed by the district court below," (and, as shown above, by other courts of appeals). Pet. App. A-23. Its "ad hoc balancing" test, based on "the relative importance of the remedies sought . . . , the positive weight or value [to the plaintiffs] of the injunctive or declaratory relief sought. . . ." Pet. App. A-23 (bracketed text in original) has little to recommend it as a means to determine where the remedial center of gravity lies in a case.

The idiosyncratic "test" chosen by the court of appeals for determining the suitability of certification under Rule 23(b)(2) is, in reality, no test at all. In every instance, putative plaintiffs seeking class certification will submit affidavits asserting that the injunctive or declaratory relief they seek is foremost in importance to them. By focussing on the class plaintiffs' subjective "interests" rather than the cohesion of the class or the relationship between the claimed relief and the investment of judicial resources needed to determine whether that relief is warranted, the rule adopted below makes Rule 23(b)(2) certification all but automatic in employment discrimination class actions. Adoption of this test raises the question identified

but left unanswered in *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994), *viz*, whether an action for damages can be certified under Rule 23(b)(2). While the *Ticor* Court expressed skepticism that such a certification would *ever* be possible,[19] the Second Circuit's opinion suggests that such a certification is all but unavoidable.

Granting the Petition also would allow the Court to address a significant question posed by the decision below; whether notice and an opportunity to opt out is permissible under Rule 23(b)(2). The proposition that notice and opt out rights are available in Rule 23(b)(2) actions, a course also suggested by other circuits,[20] cannot be squared with the text of the Rule or the Court's opinions in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) and *Ticor*. As the Court observed in *Ortiz*, subdivisions (b)(1) and (b)(2) "provide[] for certification of a class whose members *have no right to withdraw*. . . ." 527 U.S., at 817. *See also Ticor*, 511 U.S. at 121 ("Rule 23(b)(3) permits optout . . . Rules 23(b)(1) and (b)(2) . . . do not."). The decision below rewrites Rule 23, creating a new hybrid class action in which damage claims which do not satisfy the requirements of Rule 23(b)(3) may be litigated (complete with opt out notices) under Rule 23(b)(2), a wholly inappropriate state of affairs.

The "objective" and "subjective" approaches to class certification adopted by the circuits cannot co-exist. The rights of employers and employees alike in these enormous and highly significant cases should not vary from circuit to circuit. If the decision below is allowed to stand, plaintiffs will simply bring nationwide employment discrimination class actions in the Second Circuit, which alone has held that they may (indeed must) routinely be certified under Rule 23(b)(2). The Chamber

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19. *Ticor*, 511 U.S. at 121 (there "is at least a substantial possibility" that a class action seeking money damages only can be certified under Rule 23(b)(3)).

20. *See also Eubanks v. Billington*, 110 F.3d 87 (D.C. Cir. 1997); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295 (2d Cir. 1990); *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983).

respectfully suggests that the Court should grant the Petition and resolve a circuit split that affects the lives and livelihoods of thousands of individuals and their employers.

B. The Court Should Clarify Whether A Bifurcated Proof Scheme Remains Viable In Class Actions Seeking Damages.

The court below held that the district court abused its discretion by refusing to bifurcate the case and certify the "liability" portion of the case under (b)(2), leaving the class members to litigate their entitlement to individual relief before subsequent juries. Pet. App. A-32, and n.13. In essence, the court below, in line with sister circuits[21], endorsed the continuing viability of the procedural approach to so-called "pattern or practice" claims of discrimination derived from the Court's ruling in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). Continued adherence to this proof paradigm in class actions seeking money damages requiring trial by jury is directly contrary to decisions in other circuits[22] and this additional mature and highly significant split in authority warrants review and resolution by the Court.

In *Teamsters*, a government-initiated suit decided well prior to the addition of damage claims and jury trials to Title VII, the Court endorsed a bifurcated approach to the bench trial of a pattern or practice claim that has been adopted by the lower

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21. *See Thiessen v GE Capital Corp.*, 255 F.3d 1221 (10th Cir. 2001), *pet. for cert. filed*, 70 USLW 3410 (2001).

22. *See Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 420 (5th Cir. 1998); *see also Smith v. Texaco, Inc.*, 263 F.3d 394, 415 (5th Cir. 2001), *opinion withdrawn*, No. 00-40337, 2002 WL 131415 (5th Cir. Feb. 1, 2002); *Rutstein v. Avis Rent-A-Car Systems, Inc.*, 211 F.3d 1228 (11th Cir. 2000), *cert. denied sub nom Zerei Agudath Israel Bookstore v. Avis Rent-A-Car System, Inc.*, 121 S. Ct. 1354 (2001); (*Teamsters* paradigm inapplicable in case seeking legal relief); *and see Kramer*, 15 Lab. Law. 415, 475-76 (2000) (*Teamsters* paradigm not automatically applicable in cases involving jury trials and legal relief).

courts in private employment class litigation.[23] During a first "phase" of the litigation (but after a class has been certified), the court determines whether a pattern or practice of discrimination exists. If the court finds that a pattern of discrimination exists, a second "phase" of the litigation ensues (before the court or a special master) to determine whether the defendant is liable to the individual members of the class. Because the plaintiffs established during the first phase of the case that discrimination was "the regular, rather than the unusual practice," class members carry with them from that first phase a presumption that discrimination was a motivating factor in the discrete employment decisions each challenges. Aside from this presumption, the second phase resembles in nearly every respect a single-plaintiff disparate treatment discrimination trial; the employer puts on all the evidence at its disposal to justify its employment decision and the individual plaintiff/class member tries to demonstrate that this explanation is a pretext for discrimination. *See generally McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

The Seventh Amendment's re-examination clause, providing that "no fact tried by a jury shall be otherwise reexamined in any Court of the United States", U.S. Const. Amend. VII, is surely implicated by a trial scheme in which multiple juries are employed to decide whether an employer is liable to any given individual. As Judge Posner observed in *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1303 (7th Cir.), *cert. denied*, 516 U.S. 867 (1995), "[t]he right to a jury trial in federal civil cases, conferred by the Seventh Amendment, is a right to have juriable issues determined by the first jury

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23. This is not to say that the approach in *Teamsters* is applicable in all employment discrimination class actions, as the Court itself observed ("not all class actions will follow [this] model", 431 U.S. at 360). *See also Lockart v. Westinghouse Credit Corp.*, 879 F.2d 43, 57, n.15 (3d Cir. 1989) (district court not required to instruct jury under *Teamsters* paradigm even where plaintiffs allege a pattern or practice of discrimination).

impaneled to hear them (provided there are no errors warranting a new trial), and not reexamined by another finder of fact." Appellate courts repeatedly have struck down as violative of the Seventh Amendment trial schemes where one jury is asked to decide generic liability issues and subsequent juries are free to apply or refuse to apply the presumptions created by the first jury to specific individual settings, both within[24] and outside of the employment discrimination setting.[25]

"Liability" is the issue during *both* phases of a class-wide disparate treatment case. Even if the class prevails during Phase I, the employer is not liable to a single individual member of the class until a jury determines that that employee was subjected to discrimination; that determination is not made until the second phase. The primary work of the jury during Phase I, determining whether to create a presumption that each individual employment decision made respecting members of the class was discriminatory, is reexamined and tested, employment decision by employment decision, during Phase II. And because a "pattern" of discrimination is composed entirely of hundreds or thousands of individual employment decisions, aggregated through statistics, the Phase II juries (and there would have to be multiple juries to try any significant number of individual claims) necessarily would be called upon to re-examine and reevaluate the strength of a "pattern" finding made at Phase I. It may well be, for example, that most or even all of the Phase II juries find that the individual determinations upon which the

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24. *See Smith v. Texaco, Inc.*, 263 F.3d 394, 415 (5th Cir. 2001), *opinion withdrawn*, No. 00-40337, 2002 WL 131415 (5th Cir. Feb. 1, 2002) ("To meet the requirements of the Seventh Amendment, one jury may have to hear all the issues regarding the pattern and practice claim. This same jury would have to determine the quantum of compensatory and punitive damages"); *Allison v. Citgo Petroleum Corp.*, 151 F.3d at 422-25; *and see Hardin v. Caterpillar, Inc.*, 227 F.3d 268 (5th Cir. 2000) (holding that new trial could not be limited to punitive damages alone, but had to encompass liability, compensatory and punitive damages).

25. *See, e.g., Blyden v. Mancusi*, 186 F.3d 252, 268 (2d Cir. 1999); *Castano v. American Tobacco Co.*, 84 F.3d 734, 750-51 (5th Cir. 1996).

alleged pattern is based were non-discriminatory, in which event the prior jury's verdict would not only have been reexamined but rendered a legal nullity. This result cannot be reconciled with the Seventh Amendment.[26]

This constitutional issue cannot be avoided, as the court below suggested, by limiting initial proof to statistical patterns and precluding introduction of evidence relating to individual discrimination claims. *See* Pet. App. A-31 (suggesting that "evidence regarding specific instances of discrimination is relevant during the liability stage . . . [to] provide[s] 'texture' to the statistics" and should not be admitted "to establish that the particular instances of discrimination actually occurred nor that the particular employees were in fact victims of discrimination.") A defendant faced with a pattern or practice claim must be able to rebut the plaintiffs' proof not only with statistical evidence but by proving that identified individuals (often but not necessarily the named plaintiffs) were not in fact the victims of discrimination. *See Teamsters*, 431 U.S. at 360 n.46 ("[w]e do not mean to suggest that there are any particular limits to the type of evidence an employer can use" to rebut proof of an alleged pattern or practice).[27] Numerous courts have recognized that an employer accused of a pattern or practice of discrimination has the right to defend itself by proving that each individual action taken was justified and not the product of discrimination. *See Ardrey v. United Parcel Service*, 798 F.2d 679,

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26. *See generally* Fentonmiller, *Damages, Jury Trials and the Class Action under the Civil Rights Act of 1991*, 12 Lab. Law. 421, 441-42 (1997) ("it is questionable whether the Teamsters approach of bifurcating liability and damages issues is constitutional now that Title VII affords a right to jury trial and damages.").

27. Indeed, the court below noted earlier in its opinion that at Phase I "the defendant can present anecdotal and other non-statistical evidence tending to rebut the inference of discrimination. The prudent defendant will follow all three routes if possible, presenting its own version of the numbers game, attempting to undermine the plaintiff[s]' version with specific attacks on [the] validity of the plaintiff[s]' statistics, and garnering non-statistical evidentiary support as well." Pet. App. A-13 (quoting Larson, *Employment Discrimination).*

683 (4th Cir. 1986); *Coates v. Johnson & Johnson*, 756 F.2d 524, 532 (7th Cir. 1985); *Western Electric Co. v. Stern*, 544 F.2d 1196, 1199 (3d Cir. 1976) ("[T]o deny [an employer] the right to present a full defense on the issues would violate due process."). Particularly in a case such as this, where the contours of the alleged policy of "overdelegation" are so nebulous, an employer may well wish to prove at Phase I that the alleged "policy" of discrimination itself is illusory by proving that each individual decision was made completely independently of other decisions, or was justified on the merits and not the product of discrimination. Precluding an employer from presenting relevant evidence that it considers essential to its defense in order to avoid Seventh Amendment complications raises due process issues of constitutional dimension.

Wholly apart from such constitutional issues, the procedure hypothesized by the court of appeals — permitting a Phase I "liability" class trial but leaving the "remedies" phase to hundreds, perhaps thousands, of individual lawsuits — can hardly be consistent with the "principal purpose" of Rule 23, which is to promote "efficiency and economy of litigation. . . ." *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 349 (1983). While a Phase I "liability" finding shifts to the employer the burden of proof at Phase II, the subsequent trial proceedings are otherwise indistinguishable from individual, garden-variety disparate treatment cases. Because certification would not obviate the need for these myriad individual trials, the court saves nothing in judicial resources.

But certification means that, in all likelihood, there will never be a Phase I proceeding, much less *seriatim* Phase II trials. Class certification, in virtually every employment discrimination case of any size or scope, means a coerced settlement, even where the plaintiffs' case on the merits is thin or even non-existent. Until the Court considers and resolves these vitally important issues, the current trend of certification and settlement based upon speculation will continue and expand.

II. The Court Should Resolve Whether A Court May Engage In Meaningful Analysis Of Facts Proferred By Plaintiffs At The Class Certification Stage.

The Court has observed that "[a] district court's ruling on the certification issue is often the most significant decision rendered in these class-action proceedings." *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). "'A plaintiff who brings a class action presents two separate issues for judicial resolution. One is the claim on the merits; the other is the claim that he is entitled to represent a class.' 'The denial of class certification stands as an adjudication of one of the issues litigated.'" *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 402 (1980).

Because the class decision can be the litigation's most significant, and because that decision "stands as an adjudication of" that issue, the Court has repeatedly required that the parties seeking certification "show" that they have "satisf[ied]" Rule 23's requirements, *Amchem Products Inc. v. Windsor*, 521 U.S. 591, 614 (1997), and has directed district courts to perform a "rigorous analysis" to assure that the threshold mandates are met.[28] The language used by the lower courts to describe this burden varies from case to case; courts variously describe it as the "burden of proof"[29]; a burden of "persuasion"[30]; or courts charge the moving party with "showing,"[31] "establishing,"[32] or "demonstrating"[33] that these requirements are actually met.

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28. *General Telephone Co. v. Falcon*, 457 U.S. 147, 161 (1982).

29. *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 146 (4th Cir. 2001).

30. *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 600 (S.D.N.Y. 1982).

31. *Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267, 276 (4th Cir. 1980).

32. *Johnston v. HBO Film Management, Inc.*, 265 F.3d 178, 194 (3rd Cir. 2001).

33. *Doninger v. Pac. Northwest Bell, Inc.*, 564 F.2d 1304, 1312 (9th Cir. 1977).

Whatever the locution, however, "actual, not presumed, conformance with [Rule 23] remains . . . indispensable."[34]

In reversing the district court's ruling on whether Respondents had met their burden under Rule 23(a), the court below, like the Tenth Circuit in *Thiessen v. GE Capital Corp.*, 255 F.3d 1221 (10th Cir. 2001), *pet. for cert. filed*, 70 USLW 3410 (2001), transformed this burden into one of production alone; if plaintiffs are able to produce evidence suggesting on its face that the requirements of Rule 23(a) have been met, the district court may go no further.[35] The court below forbade the district court from questioning the probative value of Respondents' statistical evidence at the certification stage, concluding that Petitioner's efforts to specify the myriad errors in the proferred statistical evidence involved inappropriate "dueling of experts" that had its place — if at all — only when the merits were contested.

Nothing in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), upon which the court below relied, requires that the district court ignore disputed questions of fact — or to resolve any such disputes in favor of the class plaintiffs — if those disputes are simultaneously relevant to the merits and the class certification question. Four years after *Eisen* was decided, the Court put the decision in its proper perspective:

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34. *Falcon*, 457 U.S. at 160.

35. The court of appeals initially made this error when the case was before it for the first time. *Caridad v. Metro-North R.R.*, 191 F.3d 283 (2d Cir. 1999). Petitioner sought review at that time, but the Court denied the petition *sub nom. Metro-North R.R. v. Norris*, 529 U.S. 1107 (2000). The prior denial of certiorari does not deprive the Court of discretion to grant review of the entire case, including the issues on which it previously denied certiorari. *See, e.g., Washington v. Washington State Passenger Fishing Vessel Ass'n.*, 443 U.S. 658, 672 n.19 (1979) (denial of certiorari from an interlocutory decision does not foreclose review pursuant to a later petition in the same case), *citing Reece v. Georgia*, 350 U.S. 85, 87 (1955); *see also Scott v. United States*, 436 U.S. 128 (1978).

> [E]valuation of many of the questions entering into determinations of class action questions is intimately involved with the merits of the claims. The typicality of the representative's claims or defenses, the adequacy of the representative, and the presence of common questions of law or fact are obvious examples. [Answers to the questions posed by class certification motions are often] enmeshed in the factual and legal issues comprising the plaintiff's cause of action.

Coopers & Lybrand v. Livesay, 437 U.S. 463, 469, 469 n.12 (1978) (citation omitted).

Inevitably, in this sort of case, Rule 23 issues significantly overlap the merits, as numerous other appellate courts have recognized:

> Intertwining of the class action inquiry with the merits inquiry is of course not confined to Title VII actions, but the degree of coincidence is perhaps unique in Title VII cases such as the instant one where there exist critical substantive issues of the very existence and scope of any practice having sufficiently "common" effects on the alleged class. A consequence where this degree of coincidence exists is that fair determination of the propriety of class action may be exceedingly difficult without conducting an inquiry roughly comparable to that required to resolve the "pattern or practice" issue on the merits.

Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267, 274 (4th Cir. 1980). Thus, at the class certification stage in a pattern or practice case, at least to some degree "the class action and merit inquiries essentially coincide," because determining the class issues "in effect requires answering the substantive question whether . . . there exists the requisite pattern-or-practice

sufficiently and comparably affecting an identifiable class of protected employees." *Id.* at 274. Other circuits agree.[36]

In the Second and Tenth Circuits, however, the route to class certification involves no "rigorous analysis," only a pro forma glance at the plaintiffs' affidavits. Even if those affidavits are implausible on their face and contradicted by compelling evidence, the district court has no option; certification is required. This should not be the law in any circuit. The Court should clarify this recurrent issue and reemphasize that compliance with Rule 23 must be demonstrated, not presumed.

CONCLUSION

For the reasons expressed above, the Chamber respectfully submits that the Court should grant the Petition for a Writ of Certiorari.

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36. *See also Szabo v. Bridegport Machines, Inc.*, 249 F.3d 672, 677 (7th Cir. 2001)

> ("But nothing in . . . Rule 23, or the opinion in Eisen, prevents the district court from looking beneath the surface of a complaint. . . . Plaintiffs cannot tie the judge's hands by making allegations relevant to both the merits and class certification.")

And see Love v. Turlington, 733 F.2d 1562, 1564 (11th Cir. 1984).

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IN THE

Supreme Court of the United States

METRO-NORTH COMMUTER RAILROAD COMPANY,

Petitioner,

—v.—

CHARLES ROBINSON, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF IN FURTHER SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S REPLY BRIEF IN FURTHER SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Petitioner, Metro-North Commuter Railroad Company ("Petitioner" or "Metro-North"), respectfully submits this Reply Memorandum of Law for the limited purpose of responding to the following assertions contained in Respondents' Brief in Opposition to Petition for Writ of Certiorari ("Resp. Br."): (i) that the Court should not consider the Rule 23(a) issue because that issue was the subject of a prior Petition for Certiorari; (ii) that the Second Circuit's analysis of the statistical evidence was consistent with the approach advocated by other circuit courts; and (iii) that the Rule 23(b)(2) issues are not ripe for certification.

I.
METRO-NORTH'S PREVIOUS PETITION FOR WRIT OF CERTIORARI DOES NOT PRECLUDE THIS COURT FROM GRANTING THE PRESENT PETITION

Plaintiffs imply that, because Metro-North previously petitioned for a writ of certiorari on the Rule 23(a) issue, it would be inappropriate for the Court to grant the petition with respect to this issue now. (Resp. Br. at 5-6) There is no limitation, however, on the Court's ability to consider issues that were the subject of a prior petition for certiorari. *See, e.g., Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 672 n.19 (1979) (concluding that

Court's earlier denial of certiorari did not preclude subsequent grant of certiorari); *see also Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001) (concluding that Court had "authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals"). Moreover, the grounds for granting certiorari are more compelling now because: (i) the division among the circuit courts on the Rule 23(a) issue is much more pronounced than it was two years ago, when Metro-North filed its previous petition (*see, e.g.*, cases cited at pages 16-22 of Petition for Writ of Certiorari ("Cert. Pet.")); and (ii) the Court can best evaluate the Rule 23(b)(2) issues presented by the Petition for Certiorari in conjunction with the issues raised under Rule 23(a).[1]

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[1] By way of example, the Court should consider that the need for rigorous application of the commonality standard under Rule 23(a) would be particularly compelling here if certification is available under Rule 23(b)(2), since plaintiffs then would not need to satisfy Rule 23(b)(3)'s requirement that common issues predominate. The commonality standard would become the only avenue for questioning whether claims arising from a decentralized decision-making process are sufficiently linked to warrant class certification.

II.
THE SECOND CIRCUIT DID NOT PERFORM THE TYPE OF "RIGOROUS ANALYSIS" OF THE STATISTICAL EVIDENCE ADVOCATED BY OTHER CIRCUIT COURTS

Respondents maintain that the Second Circuit's ruling on the Rule 23(a) issues was consistent with the analyses performed by other circuit courts because, according to Respondents, it was based on a thorough analysis of both the plaintiffs' expert report and of Metro-North's report. (Resp. Br. at 7-8) A close review of the panel decision demonstrates to the contrary.

To begin with, and as pointed out in the Petition for Writ of Certiorari (Cert. Pet. at 15), the court's own characterization of its analysis, both in the *Robinson* opinion and in its more recent decision in *Visa Check/MasterMoney Antitrust Litigation v. Visa, U.S.A. Inc.*, No. 00-7699, 2001 U.S. App. LEXIS 22480, at *18-19 (2d Cir. Oct. 17, 2001), confirms that the analysis is fundamentally at odds with the approach of other Circuits. Whereas other courts have refused to accept at face value the allegations supporting the class certification motion,[2] and for that reason have scrutinized closely the expert report

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[2] These courts thus would not, as plaintiffs' suggest with their "simple example" (Resp. Br. at 10), grant certification based merely on a bald allegation that defendant has a class-wide policy of discriminating against a particular group. Plaintiffs' hypothetical is in any event irrelevant since, here, plaintiffs have conceded that there are no centralized discriminatory policies.

supporting a motion for class certification, *see* Cert. Pet. at 16-18, the Second Circuit has limited its scrutiny to "ensur[ing] that the basis of the [plaintiffs'] expert opinion is not so flawed that it would be inadmissible as a matter of law." *Visa Check*, 2001 U.S. App. LEXIS 22480, at *18.

Secondly, a review of the panel decision confirms that, notwithstanding the limitations it placed on the scope of the class, the Second Circuit did not give any consideration to the report of defendant's expert. The court limited the scope of the class for the discipline claim, not because of the criticisms in the report of defendant's expert, but rather because, in response to these criticisms, plaintiff's expert conceded that, for many positions, there was not even a facial disparity between the rates of African American and White disciplines. There were numerous other, equally pointed criticisms in the report of defendant's expert that plaintiff's expert ignored, and thus were ignored by the court as well.[3]

In short, there is a clear, outcome-determinative distinction between the standard for Rule 23(a) certification applied by the Second Circuit and other circuits.

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[3] These criticisms included demonstrations that: (i) seeming disparities between the rates of African American and White disciplines in some cases could be explained by objective data, and in others evaporated entirely once the data were controlled for geographical location; (ii) disparities in promotion rates among African Americans and Whites varied widely by department and position and disappeared entirely if the few positions from which there were no promotions were removed from the calculation.

III.
THE SECOND CIRCUIT'S "AD HOC" STANDARD AND ITS RULING ON PARTIAL CERTIFICATION CREATES IRRECONCILABLE CONFLICTS WITH THE FIFTH AND OTHER CIRCUITS

Respondents' contention that the Rule 23(b)(2) issues are not ripe for review is based on three mistaken premises.

First, Respondents assert that there is a question as to the continued vitality of the Fifth Circuit's "incidental damages" test because the Fifth Circuit withdrew its decision in *Smith v. Texaco, Inc.*, No. 00-40337, 2002 U.S. App. LEXIS 1770 (5th Cir. Feb. 1, 2002).[4] (Resp. Br. at 20) That decision was withdrawn, however, only because the case was settled and dismissed with prejudice while a Petition for Rehearing was pending. *See Texaco*, 2002 U.S. App. LEXIS 1770, at *1. The Fifth Circuit has elsewhere repeatedly endorsed Allison's incidental damages test. *See, e.g., James v. City of Dallas*, 254 F.3d 551, 572 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 919 (2002); *Bolin v. Sears Roebuck & Co.*, 231 F.3d 970, 975-76 (5th Cir. 2000); *Washington v. CSC Credit Servs. Inc.*, 199 F.3d 263, 269 (5th Cir.), *cert. denied*, 530 U.S. 1261 (2000).

Second, Respondents assert that it is unclear whether the Second Circuit's "ad hoc" test and the Fifth Circuit's "incidental damages" test will result in different class certification

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[4] Copies of unreported decisions that were not previously provided to the Court are being provided separately.

outcomes because the district court has not yet determined whether to certify the claims for compensatory damages and other individual relief. (Resp. Br. at 22) That assertion is, on its face, preposterous since the Second Circuit formulated its test precisely because it wished to prevent what it perceived to be the automatic denial of Rule 23(b)(2) certification under the "incidental damages" test. (Pet. App. A-24) Thus, regardless of the outcome in this particular case, it is clear that the Second Circuit's test will expand the availability of Rule 23(b)(2) certification of Title VII actions that include claims for compensatory damages.

Plaintiffs' third contention, that there is no dispute among the circuits on whether to bifurcate the class-wide liability and individual relief issues for class certification purposes (Resp. Br. at 23-25), is similarly misplaced. Regardless of whether the brief opinion on reconsideration in *Allison* can be viewed as withdrawing the previous pronouncements on partial certification and bifurcation, as plaintiffs contend *(see* Resp. Br. at 24), the Fifth Circuit already stated its position on this issue in *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996). *See Neely v. Ethicon, Inc.*, No. 1:00-CV-00569, 2001 U.S. Dist. LEXIS 15599, at *16 (E.D. Tex. Aug. 15, 2001) (summarizing Fifth Circuit's position on bifurcation). Furthermore, as stated in the Petition for Writ of Certiorari (Cert. Pet. at 27-30), other circuit courts have already staked out at least two distinct positions on the issue of partial certification. *See also Eubanks v. Billington*, 110 F.3d 87, 98 (D.C. Cir 1997) (endorsing "hybrid" certification).

In short, by virtue of the *Robinson* decision, the circuit courts are already deeply divided over the principal issues affecting Rule 23(b)(2) certification. There is no reason to postpone the resolution of these issues merely because the continuation of this case may provide the Second Circuit with an opportunity to widen the split. *See, e.g.*, Sup. Ct. R. 10; *Moskal v. United States*, 498 U.S. 103, 106 (1990) (resolving "divergence of opinion" between the Third and Tenth Circuits); *United States v. Lorenzetti*, 467 U.S. 167, 173 (1984) (resolving a split between the Third and Sixth Circuits where each circuit's interpretation of a federal statute was "squarely inconsistent").

CONCLUSION

For all the foregoing reasons, and those stated in Petitioner's original Petition, the Petition for Writ of Certiorari should be granted.

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